Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

LANDERS SEED COMPANY, INC.; MAXINE LANDERS; GLEN LANDERS; and CHARLES LANDERS,

Petitioners,

v.

CHAMPAIGN NATIONAL BANK, a National Banking Corporation and the JUSTICES OF THE ILLINOIS SUPREME COURT in their official capacities,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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110 pp

QUESTIONS PRESENTED

1. Does the *Rooker-Feldman* doctrine[1] bar a 42 U.S.C. § 1983 action for a declaration that a state supreme court rule pursuant to which a state appellate court judgment is entered is unconstitutional on its face as violative of due process where the rule permits a state appellate court to deprive an appellate litigant its trial judgment on a jury verdict on grounds neither preserved at trial nor presented on appeal and hence without notice and opportunity for hearing where the state appellate and supreme courts do not address, let alone resolve, the due process question even though given the opportunity to do so?

2. If the preceding question is answered in the negative, does the *Rooker-Feldman* doctrine bar the § 1983 action if it seeks a damages remedy from a party who it alleges has proximately benefitted from the state supreme court rule permitting the state reviewing courts to deprive a party its judgment on a jury verdict on grounds neither preserved at trial nor presented on appeal?

3. Does a motion to substitute the individual members of a state governmental entity in their official capacities for the governmental entity itself under Rule 25 Fed.R.Civ.P. in a § 1983 action require new service of process on the substituted parties where the substantive law is to the effect that the individually named parties in their official capacities are the same as the governmental entity itself?

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[1] *Rooker v. Fidelity Trust Company*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

PARTIES IN THE COURT BELOW

Petitioners, Landers Seed Company, Inc., Maxine Landers, Glen Landers, and Charles Landers, were the Plaintiffs-Appellants in the court below. Respondents Champaign National Bank and the Justices of the Illinois Supreme Court in their official capacities,[2] were the Defendants-Appellees.

RULE 29.1 STATEMENT

Petitioner Landers Seed Company, Inc. is an Illinois corporation. It has no parent or subsidiary corporations.

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[2] The "Illinois Supreme Court" was originally named a party defendant. The petitioners moved to substitute the Illinois Supreme Court justices in their official capacities for the Illinois Supreme Court as parties defendant. None of the respondents objected to that motion. The district court, however, failed to formally enter an order on the motion. Nevertheless, in its judgment, see App. B, 11a, it treated the motion for substitution as if it had been granted by specifying the individually named justices of the Illinois Supreme Court in their official capacities as the parties defendant. Nevertheless, on appeal the Supreme Court defendants raised an Eleventh Amendment issue which the court of appeals appeared to accept, saying the substitution was not effective without new service of process on the individual justices. That holding is covered by the third question presented for review.

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No. _____

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LANDERS SEED COMPANY, INC.; MAXINE LANDERS; GLEN LANDERS; and CHARLES LANDERS,

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Landers Seed Co., Inc., Maxine Landers, Glen Landers, and Charles Landers ("Seed Company" or "Landers"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit affirming summary judgment in favor of the respondents and against the petitioners by the United States District Court for the Central District of Illinois, Danville Division, (Baker, J.).

I. OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-10a) is reported at 15 F.3d 729 (7th Cir. 1994). The opinion and order of the district court (Baker, J.) (App. B, *infra*, 11a-17a), is not reported.

II. JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 18a), was entered February 4, 1994. Petitioners filed a timely petition for rehearing with suggestion for rehearing en banc. That petition was denied March 7, 1994. This petition for certiorari is being brought within 90 days of the court of appeals' denial of the petition for rehearing. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

III. CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

See App. D, *infra*, pp. 19a-21a.

IV. STATEMENT OF THE CASE

Petitioners sued the respondent justices of the Illinois Supreme Court in their official capacities[3] under 42 U.S.C. §1983. They sought first a declaration that Illinois Supreme Court Rule 366(a)(5) as administratively promulgated by the Illinois Supreme Court[4] was unconstitutional on its face and, second, an injunction against its future enforcement. In a separate count, petitioners sued

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[3] See Footnote 2, *supra*.

[4] Pursuant to authority conferred by 735 ILCS 5/1-104.

the Champaign National Bank ("Bank") of Champaign, Illinois for damages proximately resulting from the Bank's enforcement of a state appellate court judgment entered pursuant to an unconstitutional rule with the "significant overt assistance" of state officials.[5] Petitioners invoked the district court's jurisdiction under 28 U.S.C. §§1331, 1343(3) and 2201.

On cross motions for summary judgment,[6] the district court granted the respondent justices of the Illinois Supreme Court's motion for summary judgment on the basis of the *Rooker-Feldman* doctrine.[7] The district court dismissed petitioners' remaining claim against the Bank as being moot.

The court of appeals affirmed on three grounds. First, it held that the Eleventh Amendment barred suit under §1983 against the Illinois Supreme Court in that name. Second, it held that even if petitioners had sued the individual justices in their official capacities, *Rooker-Feldman* barred jurisdiction because by seeking damages against the Champaign National Bank, petitioners were "essentially ask[ing] the district court to invalidate a state court judgment." App. A, 8a.[8] Last, it held that *Rooker-*

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[5] See *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988).

[6] The court of appeals characterized what the district court had done was granted judgment on the pleadings. App. A, 5a. However, that is not what the district court considered that it had before it and what it did. Cf. App. B, 11a.

[7] See Footnote 1, supra.

[8] The court below also seemed to imply that Landers' action for declaratory relief by itself would not have afforded them standing. App. A, 7a. That is inaccurate. The complaint, App. E, 34a-35a, alleged that the Bank has enforced and

Feldman barred petitioners' action because it said the §1983 action was an attempt to review the denial by the Illinois appellate and supreme courts of Landers' petitions for rehearing and leave to appeal respectively in those courts, notwithstanding, that those denials were summary and without any explanation and under Illinois law had no precedential force.

The complaint[9] alleged that the Bank sued petitioners Landers Seed Company, Inc. and the individual petitioners ("Seed Company" and "Landers") on a promissory note and guarantee in state court.[10] The Seed Company answered and counterclaimed. In answering, it raised *inter alia* the affirmative defense of waiver to the Bank's claim on the note saying the Bank had agreed to forebear collecting the outstanding indebtedness for a period of up to three years while the Seed Company attempted to gain profitability.

In its counterclaim, the Seed Company alleged that in consideration of its promise to provide individual guarantees for the Bank's financing and the Seed Company's entry into a direct as opposed to participation banking relationship with the Bank, the Bank agreed to forebear

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continues to enforce the judgment. In its brief in the court below, the Bank admitted that it was continuing to enforce its judgment. Bank brief, p. 2. Therefore, Landers suffered and continue to suffer injury in fact by reason of what it has alleged is a rule of court unconstitutional on its face. *Lujan v. Defenders of Wildlife*, 119 L.Ed.2d 351, 364 (1993).

[9] App. E, 22a-36a.

[10] The Bank's case against the Seed Company as the primary obligor on the note was severed from that of the individual petitioners as guarantors of the Seed Company's indebtedness.

collecting the outstanding indebtedness for a period of up to three years while the Seed Company attempted to regain profitability. The Seed Company alleged that the Bank breached that agreement by forcing the liquidation of the Seed Company ten months after that agreement had been entered into thereby causing the Seed Company and the individual petitioners damages. The Bank never filed any pleading contending that the Seed Company's defenses or counterclaims failed to state defenses or claims or were otherwise insufficient as a matter of Illinois law.

The case was tried before a jury on the parties' respective claims. Over the Seed Company's objection, the jury was instructed that it could return a verdict in favor of both the Bank on its claim on the note and in favor of the Seed Company on its counterclaim. The jury returned a verdict in the amount of $724,637.37 for the Bank on its claim on the promissory note. It also returned a verdict in favor of the Seed Company on the amount of $60,833.31 on its counterclaim for breach of contract.

Pursuant to Illinois law governing appellate procedure in civil jury cases, 735 ILCS 5/2-102, the Seed Company filed a post-trial motion asserting *inter alia* that the verdicts were inconsistent thereby requiring a new trial.[11] The Bank also filed a post-trial motion arguing in

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[11] The elements of waiver on which the jury found against the Seed Company were exactly the same, minus consideration and breach, as the elements of breach of contract on which it found for the Seed Company. See *Moore v. Jewel Tea Company*, 46 Ill.2d 288, 263 N.E.2d 103 (1970); *Manders v. Pulice*, 44 Ill.2d 511, 256 N.E.2d 330 (1970); *Marotta v. General Motors, Corp.*, 108 L.Ed.2d 168 (1985); *Steward v. Huff*, 14 Ill.App.3d 782, 303 N.E.2d 641 (1st Dist. 1973).

opposition to the jury verdict in favor of the Seed Company that (i) evidence in violation of the parol evidence rule had been admitted, (ii) evidence in support of the Seed Company's damages was insufficient to sustain the verdict of the jury as being speculative, and (iii) the jury was improperly instructed with respect to damages.

The trial court denied the parties' respective motions. The Seed Company perfected an appeal of right to the Illinois appellate court from the Bank's judgment on the note. The Bank perfected a cross-appeal of right from the judgment on the verdict in favor of the Seed Company on its counterclaim for breach of contract.

In its cross-appeal, the Bank argued the same points it had asserted in its post-trial motion. The Seed Company responded to those arguments in a reply brief. At oral argument and, as acknowledged by the appellate court, the Bank admitted that the evidence adduced at trial by the Seed Company was sufficient from which the jury could have concluded there was a contract between the Seed Company and the Bank and the Bank had breached the contract. *Champaign National Bank v. Landers Seed Company, et al.*, 165 Ill.App.3d 1090, 1093, 519 N.E.2d 957 (4th Dist. 1988) ("*Landers I*"), App. F, 37a-49a.

In its opinion and judgment, the appellate court affirmed the judgment for the Bank on its claim on the note but reversed the judgment of the trial court in favor of the Seed Company on its breach of contract counterclaim. *Id.* In doing the latter, the appellate court held (i) the evidence was insufficient to establish that there had been a contract between the Seed Company and the Bank and (ii) the jury verdict finding that the Bank had breached its contract with the Seed Company was "against the manifest weight of the evidence." *Id.*

The Seed Company filed a petition for rehearing in the appellate court in which it argued that it had been deprived its Fourteenth Amendment due process rights as a result of the court's reversing the jury verdict in its favor without giving it notice or an opportunity to be heard respecting the issues "sufficiency of evidence of contract" and "sufficiency of evidence of breach of contract." The appellate court summarily denied the petition for rehearing without comment. App. G, 50a.

The Seed Company petitioned the Illinois Supreme Court for leave to appeal contending *inter alia* that the appellate court's judgment had deprived the Seed Company of its federal due process right of notice and an opportunity to be heard respecting the sufficiency of the evidence issues. The Illinois Supreme Court denied the Seed Company's petition for appeal as of right or leave to appeal without argument or comment. App. H, 52a.

The Seed Company then filed a petition for certiorari in this Court in what became Case No. A-88-1123 which this Court denied on February 21, 1989. Thereafter, the Seed Company filed a motion in the Illinois circuit court collaterally attacking the judgment of the appellate court[12] on *inter alia* the grounds that the appellate court judgment was entered in violation of the Due Process Clause of the Fourteenth Amendment as not affording the Seed Company notice and an opportunity for hearing.[13] The trial court denied the Seed Company's motion and

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[12] Pursuant to 735 ILCS 5/2-1401.

[13] It also argued the appellate court was without subject matter jurisdiction under Supreme Court Rule 366(b)(2)(iii) providing that "a party may not urge as error on review of the ruling on [its] post-trial motion any point, ground, or relief not specified in the motion."

entered summary judgment against the individual petitioners on the strength of the appellate court's judgment against the Seed Company in *Landers I*.

The Seed Company and the individual petitioners appealed both of those judgments to the appellate court. The Seed Company again argued *inter alia* that the judgment against *Landers I* was void as the company had not been afforded notice and opportunity for hearing respecting the issues adjudicated by the appellate court in *Landers I* contrary to the requirements of due process.

The appellate court affirmed, *Champaign National Bank v. Landers Seed Company, et al.*, 194 Ill.App.3d 1019, 551 N.E.2d 1122 (4th Dist. 1990) ("*Landers II*"), App. I, 53a-66a. In so doing, it did not address the due process question.[14] Rather, it acknowledged that it had deprived the Seed Company its judgment on a jury verdict on grounds neither preserved at trial nor presented in *Landers I* but held it had the authority to do so on the strength of Illinois Supreme Court Rule 366(a)(5). *Landers II*, App. I at 55a-60a.

Landers sought rehearing in the appellate court arguing that Rule 366(a)(5) was unconstitutional on its face as permitting an appellate court to enter judgments without affording the parties notice and an opportunity for hearing. That petition was summarily denied without comment, App. J, 67a. The Illinois Supreme Court then denied a motion for leave to appeal on the same basis without comment, App. K, 69a. Landers did not seek certiorari

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[14] Except to say that any due process problem was cured by the procedure providing for petitions for rehearing of which the Seed Company in *Landers I* had availed itself.

from this Court, but rather filed suit in federal district court as set forth on page 2, *supra*.

V. REASONS FOR GRANTING THE WRIT

A.

THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH BOTH THE MOST EXPANSIVE OF THIS COURT'S EXPLANATIONS OF THE SCOPE OF THE *ROOKER-FELDMAN* JURISDICTIONAL BAR AND THIS COURT'S MORE RECENT AND MORE LIMITED PRONOUNCEMENTS ON THE SCOPE OF THAT BAR.

In *Rooker v. Fidelity Trust Company, supra,* the federal plaintiff sought to have a state court judgment declared void because it was "rendered and affirmed in contravention of the contract clause of the Constitution of the United States and the due process of law and equal protection clauses of the Fourteenth Amendment." 263 U.S. at 414-15. The district court dismissed on the grounds that the suit was not within its jurisdiction. This Court affirmed and in so doing held that when a state court judgment has been affirmed by the state's highest court, only the United States Supreme Court had authority to correct errors of federal constitutional dimension.[15] See 28 U.S.C. §1257.

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[15] This Court explained:

> If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication.

After *Rooker, supra,* but before this Court decided *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983), *Rooker* was applied by the circuits to bar collateral attacks on state court judgments on either jurisdictional or *res judicata* grounds.[16] In *District of Columbia Court of Appeals v. Feldman, supra,* this Court reaffirmed *Rooker, supra,* as a rule of jurisdiction.

In *Feldman, supra,* the District of Columbia Court of Appeals upheld a bar committee's denial of two lawyers'

> Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the district court is strictly original.

263 U.S. at 415-16. See also *Nogue v. Clapp,* 101 U.S. 551,553-554 (1879).

[16] Examples of *Rooker* establishing a jurisdictional rule are *Bricker v. Crane,* 468 F.2d 1228, 1231 (1st Cir. 1972); *Tang v. Appellate Division of New York Supreme Court,* 487F.2d 138, 142 (2d Cir. 1973); *Atchley v. Green Hill,* 517 F.2d 692, 693 (5th Cir. 1975). Examples of *Rooker* establishing a *res judicata* rule are *Hanley v. Four Corners Vacation Properties, Inc.,* 480 F.2d 536 (10th Cir. 1973); *Turco v. Monroe County Bar Association,* 554 F.2d 515, 520-21 (2d Cir. 1977); *Ellentuck v. Kline,* 570 F.2d 414, 425 (2d Cir. 1978); *Friarton Estates, Corp. v. City of New York,* 681 F.2d 150, 158 (2d Cir. 1982); *Roy v. Jones,* 484 F.2d 96 (3d Cir. 1973).

Indeed, this Court, prior to its decision in *Feldman, supra,* cited *Rooker* as an application of *res judicata* in *Fishgold v. Sullivan Dry Dock and Repair, Corp.,* 328 U.S. 275, 282 (1946) and *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 419 (1964). In *England,* this Court said "if a party freely and without reservation submits its federal claims for decision by the state courts, litigates them there, and has then decided there, then – whether or not he seeks review of the state court decision in this Court – he has elected to forego his right to return to the district court."

applications for admission to the D.C. Bar. The lawyers sued in federal court for a declaratory judgment that the committee's actions violated their Fifth Amendment rights and sought appropriate injunctive relief. This court held that

> " 'Lower federal courts possess no power . . . to sit in direct review of state court decisions.' If the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the district court is in essence being called upon to review the state court decision. This the district court may not do."

460 U.S. at 483 n.16, quoting in part *Atlantic Coastline Railroad Company v. Locomotive Engineers,* 398 U.S. 281 (1970). This Court said that to the extent

> the[ ] allegations . . . require the district court to review a final decision of the highest court of a jurisdiction in a particular case . . . [they] are *inextricably intertwined* with the District of Columbia Court of Appeals' decisions, in judicial proceedings, to deny the respondents' petitions. The district court, therefore, does not have jurisdiction over these elements of the respondents' complaints.

Feldman, supra, 460 U.S. at 486-87 (emphasis supplied). Beyond the foregoing explanation, this Court did not provide any indication as to how a court was to determine when federal claims were "inextricably intertwined" with the state court judgment, the source of the problem in this case.

The Court in *Feldman* did, however, hold there were circumstances when a federal plaintiff could bring an action in federal court which implicated a state court

judgment: when the plaintiff "mounted a general challenge to the constitutionality of [rules of admission to the bar or rules of court]." This Court said that such challenges "do not necessarily require United States district court to review a final state court judgment in a judicial proceeding" because they "do not require review of a final state court judgment in a particular case." *Id.*

After *Feldman, supra,* this Court decided *Pennzoil v. Texaco,* 481 U.S. 1 (1987), where the federal defendant, Pennzoil, had secured a judgment against Texaco Oil Company in Texas state court. Texaco brought a §1983 action in federal court attacking the stay and lien provisions governing Texas appellate procedure as denying Texaco due process. The Second Circuit affirmed the district court's grant of an injunction and specifically held that *Rooker-Feldman* did not bar the action. This Court reversed on *Younger v. Harris,* 401 U.S. 37 (1971), abstention grounds but did not reach the merits of the *Rooker-Feldman* issue.

Even so, five justices wrote in *Pennzoil* and specifically rejected the argument that *Rooker-Feldman* precluded the district court's jurisdiction of Texaco's §1983 suit. In his opinion, Justice Brennan, the author of *Feldman, supra,* said:

> In this case . . . Texaco filed a §1983 action only to protect its federal constitutional right to a meaningful opportunity for appellate review, not to challenge the merits of the Texas suit. Texaco's federal action seeking a stay of judgment pending appeal is, therefore, an action " *'separable from and collateral to'* " the merits of the state court judgment.

Pennzoil, supra, 481 U.S. at 21 (Brennan, J., concurring) (citations omitted) (emphasis added). Justices Stevens

and Blackmun agreed with Justice Brennan. *Id.* at 31 n.3 (Stevens, J., concurring). Justice Scalia, joined by Justice O'Connor, concurred separately and expressed his view that *Rooker-Feldman* did not bar the district courts' exercise of jurisdiction "to decide *Texaco's* challenge to the constitutionality of the Texas stay and lien provisions." *Id.* at 18 (Scalia, J., concurring).

Therefore, five justices of this Court in *Pennzoil* explicitly rejected Pennzoil's *Rooker-Feldman* challenge to the district court's exercise of jurisdiction. The plurality consisting of Justice Powell, Chief Justice Rehnquist and Justice White implicitly rejected that challenge.

Only Justice Marshall disagreed and, in so doing, gave the most expansive reading to the concept "inextricably intertwined" of any member of this Court. He said a federal action was "inextricably intertwined" with a state court judgment "[w]here federal relief can only be predicated upon a conviction that the state court was wrong." *Id.* at 25 (Marshall, J., concurring). Justice Marshall concluded that "Texaco's constitutional claims were inextricably intertwined with the merits of the Texas judgment" because the district court's "determination of Texaco's claim for an injunction necessarily involves some review of the merits of its state appeal" because "the issuance of an injunction dependent upon the finding that Texaco had significant claims to assert in its state court appeal." *Id.*

Even under Justice Marshall's view, Landers' claim is not barred by *Rooker-Feldman*. The relief Landers seek in all aspects is independent of the merits of the state court judgments. *Landers I* was decided on the basis of the appellate court's conception of the substantive law of contract. *Landers II* was predicated on the appellate

court's assessment of its jurisdictional authority as conferred by Illinois Supreme Court Rule 366(a)(5). As matters of Illinois law, the appellate court's judgments in *Landers I* and *II* and may be correct, valid and enforceable. But, their correctness, validity, and enforceability have nothing to do with whether the rule pursuant to which the appellate court perceived itself authorized to render the judgment in *Landers I* is constitutional as a matter of due process.[17] *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988) (default judgment entered without notice void even though, under Texas law, the judgment debtor could not otherwise set aside a default as he had no meritorious defense.)

In a discussion of *Rooker-Feldman* subsequent to *Pennzoil, supra*, this Court appears to have given support to Justice Brennan's "separable from and collateral to" language in *Pennzoil, supra.*[18] In *Asarco, Inc. v. Kadish*, 490 U.S. 605, 622 (1989), The Court held that federal standing requirements for the perfection of a federal cause of

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[17] Indeed, the state, in its brief in the court below, argued that Rule 366(a)(5) was designed to permit an appellate court to render a correct judgment under the substantive law of Illinois where an incorrect judgment had been rendered by a trial court even if the party in whose favor the trial court had rendered judgment had no notice or opportunity to be heard respecting the "correct" substantive law. Supreme Court Defendants' brief, pp. 20-21 (Landers do not concede the appellate court in *Landers I* correctly applied the substantive law of contract, particularly in view of the fact that the court mischaracterized the contract Landers pleaded and proved as one to make future loans rather than one to forebear collecting an existing one).

[18] See Note, *The Rooker-Feldman Doctrine and the Subject Matter Jurisdiction of the Federal Courts*, 42 Rutgers L.Rev. 859, 888 (1990).

action did not apply to a state court adjudication of that cause of action. On that basis, this Court rejected the Solicitor General's argument that the state court plaintiff asserting a federal right was obliged to refile in federal court. This Court said such a procedure was precluded by *Rooker-Feldman*, "barring direct review in the lower federal courts of a decision reached by the highest state court. . . . " *Id.* (Emphasis supplied).

Therefore, the decision below is in direct conflict with this Court's most expansive explanation of the scope of *Rooker-Feldman* as set forth by Justice Marshall in *Pennzoil, supra.* A *fortiori,* it is in direct conflict with the prevailing, more recent and more limited explanations by this Court of the scope of *Rooker-Feldman* as set forth in *Pennzoil, supra,* and *Asarco, supra.* That conflict requires this Court's review of the judgment below.

B. THIS COURT'S REVIEW IS REQUIRED BECAUSE THE CIRCUITS APPLY THE *ROOKER-FELDMAN* AND ITS "INEXTRICABLY INTERTWINED" FORMULA INCONSISTENTLY LEADING TO DISPARATE RESULTS AND LEADING TO THE DECISION IN THIS CASE BEING NOT ONLY IN CONFLICT WITH THE PREVAILING DECISIONS OF THE THIRD, NINTH, TENTH, AND ELEVENTH CIRCUITS, BUT ALSO INCONSISTENT WITH OTHER DECISIONS WITHIN THE SEVENTH CIRCUIT.

After this Court decided *Pennzoil, supra,* the circuits have continued to apply the "inextricably intertwined" formula of *Feldman* often without reference to the limiting "separable from and collateral to" caveat of *Pennzoil.* Thus, some circuits permit actions challenging court rules as not being "inextricably intertwined" and some find the opposite and the action, therefore, jurisdictionally barred.

Often, the basis for these conflicting results escapes easy classification.[19]

In some cases the federal action has indisputably amounted to a direct attempt to void a state court judgment, e.g. *Blake v. Papadakos*, 953 F.2d 68, 69 (3rd Cir. 1992) (chief state court trial judge objected to Supreme Court intrusion into his administrative domain and sought federal injunction against the Supreme Court "taking any action diminishing [his] power . . . "); *Keene Corp. v. Cass*, 908 F.2d 293 (8th Cir. 1990), (plaintiffs sought federal injunction against enforcement of a state court order requiring federal plaintiffs to produce documents in state court action); *Aliaha v. Superior Court*, 871 F.2d 887 (9th Cir. 1989) (federal plaintiff sought "direct review of state court's judgment").

But, in other cases, the circuits have read "inextricably intertwined", even in the face of *Pennzoil*, inconsistently. For example, in *Stern v. Nix*, 840 F.2d 208 (3d Cir.), cert. denied, 109 S.Ct. 77 (1988), the court held an action attacking a Pennsylvania Supreme Court rule governing lawyer discipline as "a skillful attempt to mask the true purpose of the action" which the court said was to void the Pennsylvania Supreme Court's judgment. Yet, in an action scarcely distinguishable from *Stern, supra*, the Third Circuit permitted a generalized constitutional challenge to the same state court rule in *Centifanti v. Nix*, 865 F.2d 1422, 1426 (3d Cir. 1989).

Similarly to *Centifanti, supra*, the Tenth Circuit in *Razatos v. Colorado Supreme Court*, 746 F.2d 1429, 1434 (10th Cir. 1984), reversed the district court's invocation of

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[19] See generally compilation of cases in Note, 42 Rutgers L.Rev., *supra* at 880-884, 891-893, and 895-896.

Rooker-Feldman as a jurisdictional bar. It said that plaintiff's constitutional challenge to a lawyer discipline rule was not "inextricably intertwined" with the decision of the Colorado Supreme Court because the federal court did not need to review the decision of the Colorado Supreme Court in order to evaluate the plaintiff's constitutional claim. *Id.* Rather, the district court "need[ed] only to look at [the] rule . . . as promulgated, and as construed by state case law", *Id.* The Tenth Circuit relied on the Eleventh Circuit's decision in *Wood v. Orange County*, 715 F.2d 1543, 1546 (11th Cir. 1983), which said that a federal plaintiff was not barred by *Rooker-Feldman* where he had no opportunity to fairly raise and fairly be heard in state court on his federal constitutional claim.

In an exceptionally well reasoned opinion, the Ninth Circuit in *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), vacated, 477 U.S. 902 (1985) (*Robinson I*),[20] broke *Rooker-Feldman* into what it said were its component parts. It held that this Court's decision in *Rooker, supra*, barred this Court under 28 U.S.C. §1257 only with respect to constitutional questions arising in the state court

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[20] *Robinson I* was vacated on ripeness grounds by this Court and the decision remanded for reconsideration in light of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1986). The Ninth Circuit, in turn, remanded the case to the district court for consideration of the ripeness issue. In the second appeal, *Robinson v. Ariyoshi*, 887 F.2d 215, 216 (9th Cir. 1989) (*Robinson II*), the court held the controversy was not right. However, the *Rooker-Feldman* analysis in *Robinson I* remains intact as exemplified by the Ninth Circuit's interlocutory decision in *Robinson v. Ariyoshi*, 854 F.2d 1189 (9th Cir. 1988), restricting the issue on remand to the takings question set forth in *Williamson, supra*, and not to other issues which the state attempted to relitigate.

which " 'actually arose in the cause' in which a full hearing was held and where the judgment was responsive to the issues." *Robinson I, supra,* 753 F.2d at 1472, quoting *Rooker,* 263 U.S. at 415. Thus, the *Robinson I* court held that *Rooker* by itself did not create a jurisdictional barrier but rather an application of *res judicata* principles. *Id.*

In that respect, the *Robinson I* court said "[I]f consideration and decision have been accomplished [in state court], action in the federal court is an impermissible 'appeal' from the state court decision." *Id.* But, "if no consideration has been given, or any decision on the matter is ambiguous, it is unlikely that the issues presented to the state high court and to the federal court are so 'inextricably intertwined' that the federal court cannot take jurisdiction." *Id.* Nor, said the *Robinson* court, "is it likely that there will have been a full enough and fair enough opportunity for litigation to warrant the claim preclusive effect of *res judicata.*" *Id.* Cf. *Haring v. Prosise,* 462 U.S. 306 (1983) (no collateral estoppel effect given to state court judgment where the complaining party neither had full and fair opportunity to litigate the claim or where the state court "demonstrated an inability or unwillingness to protect federal rights.")

Applying those principles, the court in *Robinson I* noted the Supreme Court of Hawaii had *sua sponte* overruled pre-statehood cases dealing with water rights without that issue ever having been presented to the state courts by the parties. That was the posture of Landers after the appellate court's decision in *Landers I,* to wit, a state appellate decision *sua sponte* adjudicating issues never preserved at trial nor presented on appeal thereby creating a constitutional claim followed by the denials,

without comment, of petitions for rehearing and leave to appeal raising the constitutional claim.

However, unlike the court below in this case, the Ninth Circuit in *Robinson I* said "we cannot see how federal constitutional issues which the state court refused to consider in a petition for rehearing are at all, let alone inextricably, intertwined with previously reached state court judgments on riparian rights." *Id.*, 753 F.2d at 1472-73. The court continued: "[w]e are not asked to decide whether the composite denial of rehearing and refusal to hear was correct; . . . [citation omitted] we are asked to review district court findings about constitutional claims which themselves were never decided by a state court, intertwined or otherwise."[21]

The decision below is also in direct conflict with other panels of the Seventh Circuit which have, it seems, correctly applied *Rooker-Feldman*. For example, in *Leaf v. Supreme Court of the State of Wisconsin*, 979 F.2d 589, 598 (7th Cir. 1992), another attorney discipline case, the Seventh Circuit affirmed the district court's dismissal of the federal plaintiffs' complaint on *Rooker-Feldman* grounds.

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[21] The petitioners' position is stronger than that of the *Robinson I* parties who filed their §1983 action immediately after this Court denied certiorari following the summary denial of rehearing by the Supreme Court of Hawaii. Petitioners here collaterally attacked the appellate court judgment in *Landers I* in state court leading to *Landers II* at which point they discovered that the judgment in *Landers I* was mandated by Supreme Court Rule 366(a)(5) which they then attacked in the Illinois Appellate and Supreme Courts as being facially unconstitutional on petitions for rehearing and leave to appeal both of which were summarily denied at which point Landers brought this action.

It held that the federal claim was "inextricably intertwined" with the state court judgment because the Wisconsin Supreme Court had concluded that " '[n]one of the charges Attorney Leaf [had] made [had] been substantiated or [had] the least merit,' " *Id.*, quoting *In Re Disciplinary Proceedings Against Leaf*, 476 N.W.2d 13, 18 (Wis.S.Ct. 1991). The Seventh Circuit panel held respecting the federal complaint raising the same issues as were before the Wisconsin court that "when a court labels a contention as without merit, it has considered the claim in rendering its ensuing judgment, and a rejection of such claim becomes part of the judgment." *Leaf, supra*, 979 F.2d at 599.

However, in this case, the denials of petitions for rehearing and for leave to appeal were, unlike *Leaf*, but as in *Ariyoshi, supra*, without comment or other indication there had been any consideration of the merits. The lower court in this case did not cite *Leaf*. The *Leaf* decision appears to be a correct application of *Rooker-Feldman* whether viewed as a jurisdictional bar or as an aspect of *res judicata*.

In a later Seventh Circuit decision, *Buckley v. Illinois Judicial Inquiry Board, et al.*, 997 F.2d 224 (7th Cir. 1993), Judge Posner for the court rejected a *Rooker-Feldman* defense to a claim almost identical to the one in this case. In *Buckley*, an Illinois judge had been reprimanded by the Illinois Courts Commission for having violated an Illinois supreme court rule forbidding certain types of political activity. No further relief was available to him in the Illinois courts. His only direct relief was by certiorari from this Court. However, he sought declaratory and injunctive relief in federal court under §1983 in order to void the rule and stop its enforcement so that he could

"run in future judicial elections unimpeded by it. . . . " 997 F.2d at 227.

The foregoing is the posture of this case. Landers have sought a declaration respecting their rights under a rule of court which they say has caused and continues to cause them damage. They do not seek a declaration that the judgments against them are void or incorrect. They do not seek injunction against the enforcement of those judgments. Indeed, they concede the judgments to be altogether valid and enforceable in terms of Illinois substantive law.

The court below nowhere attempted to distinguish *Buckley* as it cannot be distinguished. Therefore, there is an irreconcilable conflict between the result reached by the court below and by the Seventh Circuit panel in *Buckley, supra.* This intracircuit conflict compounds the conflict between the decision below and the decisions of other circuits, which themselves are often plagued by intracircuit conflict as in *Stern v. Nix, supra,* and *Centifanti v. Nix, supra.* These conflicts require resolution by this Court.

C. THE *ROOKER-FELDMAN* QUESTION PRESENTED IS OF SUBSTANTIAL IMPORTANCE BECAUSE OF THE UNCERTAIN NATURE OF THE CONCEPT "INEXTRICABLY INTERTWINED", BECAUSE OF THAT CONCEPT'S UNCLEAR RELATION TO OTHER ESTABLISHED DOCTRINES SUCH AS *RES JUDICATA*, FULL FAITH AND CREDIT UNDER 28 U.S.C. §1738, AND YOUNGER ABSTENTION, AND BECAUSE OF THE RECURRING NATURE OF SUITS ATTACKING LEGISLATIVELY OR ADMINISTRATIVELY PROMULGATED RULES OF COURT LEADING TO DISPARATE RESULTS AND OFTEN UNCONSTITUTIONAL DECLINATIONS OF FEDERAL JURISDICTION.

To the extent the *Rooker-Feldman* Doctrine is restricted to what this Court in *Asarco, supra,* referred to as an attempt to seek "direct review" in federal court of the merits of a state court judgment, there can be little dispute that it does and should operate as a jurisdictional bar to a federal action. Moreover, to the extent the *Rooker-Feldman* concept of "inextricably intertwined" is understood as being qualified and limited by the concept Justice Brennan, joined by Justices Blackmun and Stevens, stated as "separable from and collateral to" the merits of the state court judgment, *Rooker-Feldman* has understandable meaning as a jurisdictional bar. See *Pennzoil, supra,* 481 U.S. at 21 (Brennan, J., concurring).

Beyond those limitations, however, *Rooker-Feldman* appears to be duplicative of other principles governing justiciability such as *res judicata,* full faith and credit

under 28 U.S.C. §1738 and *Younger* abstention.[22] Nevertheless, the circuits, as evidenced by any number of cases subsequent to *Pennzoil, supra,* including the Seventh Circuit in this case, continue to apply the "inextricably intertwined" notion indiscriminately when they often have overlooked the "separable from and collateral to" caveat to "inextricably intertwined" or used it so that it is duplicative of *res judicata,* full faith and credit, or *Younger* abstention.

For example, then judge now Justice Thomas in a thoughtful concurring opinion in *Cross Sound Ferry Services, Inc. v. Interstate Commerce Commission,* 934 F.2d 327, 343 (D.C. Cir. 1991), argued that the "inextricably intertwined" formula was often another way of applying preclusion under 28 U.S.C. §1738. In *Gash and Associates v. Village of Rosemont,* 995 F.2d 726, 728 (7th Cir. 1993), Judge Easterbrook observed that "equating the *Rooker-Feldman* Doctrine with preclusion is natural; both sets of principles define the respect one court owes to an earlier judgment." But, Judge Easterbrook pointed out that the *Rooker-Feldman* doctrine more specifically asks:

> "is the federal plaintiff seeking to set aside a state judgment, or does he present some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party? If the former, then the district court lacks jurisdiction; if the latter, then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion."

Id.

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[22] See Footnote 18, *supra.*

Judge Easterbrook's summary was anticipated by the Ninth Circuit in *Robinson v. Ariyoshi, supra,* where it said, "[u]nder the rubric of either 'jurisdiction' or *'res judicata'*, the crux of the question is whether there has already been an actual consideration of and a decision on the issue presented." *Robinson, supra,* 753 F.2d at 1472. In analyzing the case before it in those terms, which, it must be remembered, were virtually the same as in this case, the court in *Robinson* was convincing:

> "If the procedural posture of the state court action had, for some reason, altogether prevented the plaintiffs from raising federal constitutional claims in their petition for rehearing, the federal district court would have had original jurisdiction over those claims (citation omitted). *We are loathe to grant less constitutional protection where plaintiffs have responsibly exercised an opportunity to raise their claims and have been turned away from the state tribunal without so much as an explanation.* Like the Court in *Wood (v. Orange County,* 715 F.2d 1543, 1546-47 (11th Cir. 1983)), we are concerned that '[s]uch a result might deprive [plaintiffs] of any forum, state or federal, where [they have] a reasonable opportunity to present [their] federal constitutional claims, a result arguably contrary to the requirement of due process.' "

Robinson, supra, 753 F.2d at 1473 n.3 (emphasis supplied).

The court below applied a form of *res judicata* or 28 U.S.C. §1738 preclusion in its *Rooker-Feldman* analysis in saying that the denial without comment of Landers' petitions for rehearing and leave to appeal were state court judgments which petitioners could not review in federal court under *Rooker-Feldman.* However, it is undisputed and indisputable under Illinois law that Illinois courts

would not treat the summary denials of petitions for rehearing and leave to appeal as judgments "on the merits" entitled to preclusive effect.[23] Therefore, consistently with Judge Easterbrook's analysis in *Gash, supra,* and the analysis in *Robinson v. Ariyoshi, supra,* petitioners' federal action was one which the lower courts should not have barred under either 28 U.S.C. §1738 or *Rooker-Feldman.*

The relationship of *Rooker-Feldman* and *Younger* abstention is illustrated by the treatment of those

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[23] Under Illinois law a petition for rehearing does not alter the effective date of the entry of a judgment, *P.S.L. Realty v. Granite Investments,* 86 Ill.2d 291, 304 (1981). Only where a reviewing court grants a petition for rehearing is the effective date or finality of the judgment changed. *Id.* at 305. Additionally, the Illinois Supreme Court has held that "before a judgment can stand as a bar to subsequent actions under the doctrine of *res judicata,* the first action must result in a *final judgment on the merits.*" *Relph Board of Education,* 84 Ill.2d 436, 442 (1981) (emphasis supplied).

Two years ago, the Illinois Supreme Court held in *Burris v. Progressive Land Developers,* 151 Ill.2d 285, 294-296 (1992), that a judgment "on the merits" is "an adjudication referr[ing] to the *substantive rights* of the parties" (emphasis supplied). See also Illinois Supreme Court's earlier decision in *People v. Board of Education,* 350 Ill. 597, 601 (Ill. 1932), where the court held that a judgment "on the merits" for *res judicata* purposes resulted from "a proceeding [which] afford[ed] adequate opportunity for investigation and determination. . . . " Moreover, in *People v. Vance,* 76 Ill.2d 171, 183 (1979), the Illinois Supreme Court specifically stated that "our denials of leave to appeal . . . carry no connotation of approval or disapproval of the appellate court action, and signify only that four members of this court, for reasons satisfactory to them, have not voted to grant leave." The Supreme Court in *Relph, supra,* said in the same vein that the denial of leave to appeal "has no precedential effect and in no way amounts to the consideration of the merits of case[]." *Relph, supra,* 84 Ill.2d at 442.

doctrines in the various opinions in *Pennzoil, supra. Younger* abstention is based on "comity" and "a sensitivity to the legitimate interests of both state and national governments." *Pennzoil, supra,* 481 U.S. at 10, quoting *Younger,* 401 U.S. at 44. Thus, the plurality in *Pennzoil* said the state had an interest "in enforcing the orders and judgments of their courts" and that federal injunctions would preclude that interest "on grounds that challenge the very process by which those judgments were obtained." *Pennzoil, supra* at 13-14.

In this case, more clearly than in *Pennzoil, supra,* and *Robinson v. Ariyoshi, supra, Younger* abstention is inapplicable. Landers exhausted every state judicial remedy twice. They presented their due process attack on Rule 366(a)(5) in the only state judicial fora available. Nevertheless, Landers never received a state court adjudication on the constitutionality under the Due Process Clause of Rule 366(a)(5). Yet, the court of appeals applied *Rooker-Feldman* as if they had.

The result and rationale below mirror the confusing state of *Rooker-Feldman* as applied by the circuits. Guidance is, therefore, required from this Court to delineate when *Rooker-Feldman* does apply vis-a-vis 28 U.S.C. §1738 preclusion and *Younger* abstention; to determine if it applies under an "inextricably intertwined" formula, and, if so, whether that formula is modified by Justice Brennan's "separable from and collateral to" language so as to conform to the "direct review" language of this Court in *Asarco, supra.*[24]

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[24] When Landers first sought certiorari from this Court after the denials of petitions for rehearing and leave to appeal from the appellate court's judgment in *Landers I,* they did not

It is important that this Court render this guidance because it has "long supported the proposition the federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Public Service, Inc. v. New Orleans*, 491 U.S. 350, 358 (1989). Thus, a federal court " '[has] no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.' " *Id.*, quoting *Cohens v. Virginia*, 6 Wheat 264, 404 (1821). Thus,

> " 'when a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . The right of a party plaintiff to choose a Federal court where there is choice cannot be properly denied.' "

Id. at 358-59, quoting *Willcox v. Consolidated Gas Company*, 212 U.S. 19, 40 (1909).

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know that the basis for the judgment in *Landers I* was Illinois Supreme Court Rule 366(a)(5). Rather, they thought the judgment was simply an aberration which worked a severe injustice on them. Thus, they were constrained to advise this Court in their petition for certiorari that the issue presented was likely not one of a "recurring" nature, Pet. Cert., No. A88-1123, p. 12.

However, the opposite is true in the case now based as it is on Illinois Supreme Court Rule 366(a)(5); based on the fact that the Illinois Attorney General argues that appellate courts not only have the authority under the rule to deprive a litigant a trial court judgment on a jury verdict on grounds neither preserved at trial nor presented on appeal, but should have that power; and most importantly, based on the number of suits which are brought challenging in some form or another state court rules leading to an "embarrassing diversity" of results, *Albright v. Oliver*, ___ U.S. ___, ___ n.4 (1994), quoting *Albright v. Oliver*, 975 F.2d 343, 345 (7th Cir. 1993).

However, with *Rooker-Feldman* being understood and applied in inconsistent fashions, federal courts, as in this case, are abdicating jurisdiction when they should exercise it. That is contrary to the constitutional duty of the federal courts. *New Orleans Public Service v. New Orleans, supra.* This case is well suited to enable this Court to provide guidance for the clarification and resolution of the meaning and scope of *Rooker-Feldman.* Such guidance would ensure that federal courts properly exercise jurisdiction when appropriate in cases raising *Rooker-Feldman* problems.

D. THE JUDGMENT OF THE COURT BELOW REQUIRING THAT A SUBSTITUTION OF PARTIES UNDER RULE 25 NECESSITATES NEW SERVICE OF PROCESS ON THE SUBSTITUTED PARTIES EVEN WHERE THE SUBSTANTIVE LAW MAKES THE SUBSTITUTED PARTIES THE SAME AS THE PARTY FOR WHICH THEY WERE SUBSTITUTED PRESENTS AN IMPORTANT QUESTION OF FEDERAL CIVIL PROCEDURE AS IT APPEARS PLAINLY AT VARIANCE WITH BOTH THE LANGUAGE AND INTENT OF RULE 25.

Rule 25(d) Fed.R.Civ.P. provides in relevant part that

> "proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution."

It is long established that "official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Department of Social Services,* 436 U.S. 658, 690 n.

55 (1978); *Brandon v. Holt*, 469 U.S. 464, 471-472 (1985); *Kentucky v. Graham*, 471 U.S. 159, 166 (1985).

In the original complaint, petitioners improperly named the Illinois Supreme Court as a party defendant. Shortly thereafter, they moved to substitute the individually named justices of the Illinois Supreme Court in their official capacities as parties defendant. Doc. 16. The respondents did not object to that motion. The district court did not directly act upon that motion. Nevertheless, the district court in *de facto* fashion granted the motion as its order upon which its judgment is based and from which the appeal to the Seventh Circuit was brought recites in full in its precatory paragraph:

> "Before the court are motions for summary judgment by the plaintiffs (Doc. 14) and the defendants, Champaign National Bank (Doc. 10) (hereafter "the Bank") and *the members of the Illinois Supreme Court in their official capacity* [sic]."

App. B, 11a (emphasis supplied). The Supreme Court defendants never sought clarification of that order nor otherwise questioned its validity.

The Seventh Circuit's opinion which recites authorities construing Rule 21 Fed.R.Civ.P. relating to dropping and adding parties where a new service of process is required seems manifestly incorrect under Rule 25(d). Under the substantive law, the individual members of the Illinois Supreme Court in their official capacities had notice of the suit by reason of the court itself having been served. *Monell, supra.* Moreover, at most, a misnomer was involved which Rule 25(d) cautions "shall be disregarded if not affecting substantive rights." It is important that this Court clarify this question lest the Seventh Circuit's

published opinion create confusion and make more difficult the salutary function toward judicial economy that Rule 25(d) was designed to afford.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 92-3984

LANDERS SEED COMPANY, INCORPORATED, MAXINE LANDERS, GLEN LANDERS, *et al.*,

Plaintiffs-Appellants,

v.

CHAMPAIGN NATIONAL BANK, a National Banking Corporation, and SUPREME COURT OF THE STATE OF ILLINOIS,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Danville Division.
No. 92 C 2467 – **Harold A. Baker,** *Judge.*

ARGUED NOVEMBER 9, 1993 – DECIDED FEBRUARY 4, 1994

Before GIBSON,* CUMMINGS and FLAUM, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This case has taken a long and tortured path to reach this Court. In a trial held over six years ago, defendant Champaign National Bank sued

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* The Honorable Floyd R. Gibson of the United States Court of Appeals for the Eighth Circuit is sitting by designation.

Landers Seed Company, Incorporated, and Maxine, Glen and Charles Landers (plaintiffs are referred to jointly herein as "Landers") in the Circuit Court for the Sixth Judicial Circuit, Moultrie County, Illinois, to collect on a promissory note. Landers counterclaimed for breach of contract. The bank received a jury verdict in excess of $724,000 and Landers received a verdict of over $60,000 on their counterclaim. Both sides appealed. The Appellate Court of Illinois, Fourth District, affirmed the judgment in favor of the bank, but reversed the judgment on the counterclaim for insufficiency of evidence. For the five years since that decision Landers has tried to persuade both state and federal courts that the Illinois appellate court's reversal of the Landers counterclaim was unconstitutional for various reasons and should not stand.

Landers' campaign began with a petition for rehearing, which was denied by the Appellate Court of Illinois. The Illinois Supreme Court then denied Landers' petition for leave to appeal and the United States Supreme Court denied Landers' petition for certiorari. Subsequently, in a motion for relief from judgment, Landers asked the state trial court to declare the Illinois appellate court's judgment void and unenforceable. This was denied. The appellate court affirmed, 194 Ill. App. 3d 1019, 551 N.E.2d 1122 (4th Dist. 1990), and denied a petition for rehearing. The Illinois Supreme Court denied leave to appeal.

Landers then sued the Champaign National Bank and the Illinois Supreme Court in the United States District Court for the Central District of Illinois under 42 U.S.C. § 1983. The district court dismissed the case for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine embodied in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413,

and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462. Landers now appeals this most recent defeat. We affirm.

Facts

Landers Seed Company was a closely-held family corporation that did business as a grain seed company in Sullivan, Illinois. The individual plaintiffs owned and ran Landers Seed Company and had guaranteed a promissory note issued by that company to Champaign National Bank. The bank eventually sued Landers on the promissory note and Landers counterclaimed for breach of contract. In June 1987 the state trial court entered judgment on the jury's verdict in the bank's favor for $724,637.37 and on the jury's verdict in Landers' favor for $60,833.31 on their counterclaim. Both sides appealed, and although the Appellate Court of Illinois, Fourth District, affirmed the judgment in favor of the bank, it reversed the judgment on the counterclaim for insufficiency of evidence. 165 Ill. App. 3d 1090, 519 N.E.2d 957 (4th Dist. 1988).

Hoping to have the appellate court's ruling on the counterclaim overturned (and the jury verdict in its favor reinstated), Landers filed a petition for a rehearing. The petition was denied. Landers subsequently filed a petition to the Illinois Supreme Court for leave to appeal. When this petition was denied, 122 Ill. 2d 571, 530 N.E.2d 240 (1988), Landers filed a petition in the United States Supreme Court asking it to grant certiorari. This petition, meeting the same fate as those that preceded it, was denied. 489 U.S. 1019. Each of these petitions alleged that

the Illinois appellate court's reversal of the judgment on Landers' counterclaim on grounds not argued by the bank violated Landers' rights under the Due Process Clause of the Fourteenth Amendment.

Its efforts to resurrect the judgment on the counterclaim undeterred by the denial of these various petitions, Landers returned to the state trial court and in a motion for relief from judgment asked it to declare the Illinois appellate court's judgment void and unenforceable because it relied on arguments not advanced by the parties at any time in the prior proceedings. Landers' motion claimed the appellate court's judgment violated both Illinois Supreme Court Rule 366(b)(2)(iii)[1] and the Due Process Clause. This motion was denied. Landers appealed this denial to the Appellate Court of Illinois, which affirmed, holding that under Illinois Supreme Court Rule 366(a)(5)[2] the parties' arguments did not bind the *Landers I* court and that its first opinion was proper. 194 Ill. App.

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[1] That rule provides:

> *Post-Trial Motion.* A party may not urge as error on review of the ruling on his post-trial motion any point, ground, or relief not specified in the motion.

[2] Rule 366(a)(5) provides:

> In all appeals the reviewing court may, in its discretion, and on such terms as it deems just:
>
> * * *
>
> (5) Enter any judgment and make any order that ought to have been given or made, and make any other and further orders and grant any relief, including a remandment, a partial reversal, the order of a partial new trial, the entry of a remittitur, or the enforcement of a judgment, that the case may require.

3d 1019, 551 N.E.2d 1122 (4th Dist. 1990). Thereafter Landers filed a petition for rehearing in the Illinois Appellate Court and a petition for leave to appeal in the Illinois Supreme Court, claiming that Rule 366(a)(5) violated the Due Process Clause because it gave the appellate court too much discretion. These petitioners were denied. See, *e.g.*, 133 Ill. 2d 553, 561 N.E.2d 687 (1990). This time Landers did not petition the United States Supreme Court to grant certiorari.

Having failed in the state court system to obtain the result they desired, Landers commenced the action now before this Court, suing Champaign National Bank and the Illinois Supreme Court in the United States District Court for the Central District of Illinois under 42 U.S.C. § 1983. In this action, Landers seeks a declaration that Rule 366(a)(5) violates the Due Process Clause; an injunction prohibiting the Illinois Supreme Court from continuing to enforce Rule 366(a)(5); and damages from Champaign National Bank equal to Landers' losses caused by the judgments the Bank secured through state court proceedings. Landers claims that the bank would not have recovered such judgment except for the assertedly void and unconstitutional Rule 366(a)(5). Champaign National Bank and the Illinois Supreme Court moved to dismiss the suit. The Illinois Supreme Court, however, soon filed an answer and moved to convert its motion to dismiss into a motion for judgment on the pleadings. The motion to convert was granted. In response, Landers filed a motion for "limited summary

judgment" and a motion to substitute the individual justices of the Illinois Supreme Court in their official capacities as defendants in lieu of the Illinois Supreme Court itself.

In November 1992 Judge Baker granted the defendants' motions for judgment on the pleadings. The district court held that the complaint sought a federal declaration that the Illinois appellate court's judgment was invalid. The case was dismissed for lack of subject matter jurisdiction on the ground that under the *Rooker-Feldman* doctrine only the Supreme Court of the United States had jurisdiction in these circumstances to invalidate a state court judgment.

Subject Matter Jurisdiction over the Claims Against the Illinois Supreme Court

In the case now before us, Landers has brought suit against the Illinois Supreme Court. The Eleventh Amendment, however, bars federal suits against state courts and other branches of state government, *Clark v. Clark*, 984 F.2d 272 (8th Cir. 1993) (action against state court barred by Eleventh Amendment), certiorari denied, 114 S.Ct. 93.[3] The Eleventh Amendment bars federal jurisdiction here since the Illinois Supreme Court itself is the named defendant and not the individual members of that court. This is true even though Landers moved, after their initial filing, to substitute the justices of the Illinois Supreme Court as

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[3] In *Clark*, the Court of Appeals also noted that state courts are not proper defendants in § 1983 actions, such as the one here, since courts are not "persons" within the meaning of 42 U.S.C. § 1983. 984 F.2d at 273.

the defendants in lieu of the court itself. Since Landers failed to serve the justices with summonses and complaints as required by Federal Rule of Civil Procedure 21, the justices were not made parties to this suit. See, *e.g.*, 7 Charles A. Wright, *et al.*, Federal Practice and Procedure § 1688 (2d ed. 1986); 3A Jeremy C. Moore, *et al.*, Moore's Federal Practice ¶ 21.05[1] (2d ed. 1993). Because Landers failed to make the individual justices of the Illinois Supreme Court parties to the suit, the federal courts have no jurisdiction over Landers' claim regarding the state supreme court.

Applicability of Rooker-Feldman Doctrine

Even if Landers had in fact filed suit against the individual justices of the Illinois Supreme Court, the district court would have lacked subject matter jurisdiction over the controversy. Since the relief Landers requests would, if granted, effectively reverse the initial state appellate court ruling in its case and since the constitutional claims it raises would, if successful, void that ruling, the *Rooker-Feldman* doctrine bars jurisdiction.

Landers seeks a declaration and an injunction invalidating Illinois Supreme Court Rule 366(a)(5) and also seeks damages equal to the amount Champaign National Bank secured by virtue of the Illinois appellate court's invocation of Rule 366(a)(5). First Amended Complaint at 14-15. If Landers sought only injunctive and declaratory relief, it would not have standing to sue. *Facio v. Jones*, 929 F.2d 541, 543 (10th Cir. 1991). However, by requesting restitution of losses it incurred on account of the Illinois courts' use of Rule 366(a)(5), Landers seeks to

remedy a past injury and therefore has sufficient interest in the controversy to have standing.

Although pursuing damages gives Landers standing, it raises a separate problem. By asking the district court to order Champaign National Bank to return the property it secured by way of a state court judgment, Landers essentially asks that the district court invalidate a state court judgment. The *Rooker-Feldman* doctrine, however, makes clear that a federal district court – except in limited circumstances – does not have the authority to review state court determinations, since such authority resides solely with the United States Supreme Court, *Feldman*, 460 U.S. at 482, 486; *Rooker*, 263 U.S. at 416; *see also Lynk v. LaPorte Superior Court No. 2*, 789 F.2d 554, 563 (7th Cir. 1986) (noting that allowing district courts to have jurisdiction would "displace almost the whole of state litigation into the federal courts by making the final judgment in state court the cause of action that kicks off a suit to undo that judgment in federal court"). And despite its efforts, Landers cannot squeeze its case into the narrow exception carved out in *Feldman*. There the Supreme Court held that a district court may preside over constitutional challenges to state court rules if such review does "not require review of a final state-court judgment in a particular case." 460 U.S. at 486. The *Feldman* court noted, however, that when

> the constitutional claims presented to the U.S. district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's [claim], then the district court is in essence being called upon to

> review the state-court decision. This the district court may not do.

460 U.S. at 483-484 n.16.

It is clear that the relief Landers seeks and the constitutional claim it presents here are "inextricably intertwined" with the various state court determinations handed down previously. First, since the relief sought by Landers would in effect require invalidating the Appellate Court of Illinois' first determination in this case, Landers' claim is "inextricably intertwined" with that determination. See *Facio v. Jones*, 929 F.2d at 543 (claim is "inextricably intertwined" where relief on which standing is premised would require district court to upset state court judgment).

Second, Landers' claim is "inextricably intertwined" with the appellate judgments rendered on Landers' motion for relief of the initial judgment. In its petition for rehearing and its petition to the Illinois Supreme Court for leave to appeal, Landers attacked the constitutionality of Rule 366(a)(5), the rule on which the Illinois Appellate Court grounded its affirmance of Landers' earlier appeal. Landers' petitions were denied. The claims raised before the district court attack the constitutionality of Rule 366(a)(5) on the same basis as Landers' petitions, and thus in essence ask the district court to review these denials. Had Landers desired a review of those denials and of the constitutionality of Rule 366(a)(5), it should have petitioned the Supreme Court of the United States for a writ of certiorari after the Illinois Supreme Court denied leave to appeal. This was certainly a procedure of

which plaintiff was aware, having utilized it in its previous round of appeals. More importantly, this is the procedure required by 28 U.S.C. § 1257, which addresses United States Supreme Court review of state court determinations.

Since the claim Landers makes and the relief it seeks are "inextricably intertwined" with earlier state court judgments, the district court properly dismissed the plaintiffs' first amended complaint for lack of subject matter jurisdiction.

Judgment affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

LANDERS SEED CO., INC., et al.,	)	
Plaintiffs,	)	No. 91-2467
vs.	)	(Filed Nov. 23, 1992)
CHAMPAIGN NATIONAL BANK, et al.,	)	
Defendants.	)	

ORDER

Before the court are motions for summary judgment by the plaintiffs (docket #14) and the defendants, Champaign National Bank (docket #10) (hereafter "the bank") and the members of the Illinois Supreme Court in their official capacity (docket #9).

The plaintiffs allege that Illinois Supreme Court rule 366(a)(5)[1] violates due process and is unconstitutional

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[1] Illinois Supreme Court rule 366(a)(5), Ill. Ann. Stat. ch. 110A, para. 366(a)(5) (Smith-Hurd 1985), in relevant part, provides,

> In all appeals the reviewing court may, in its discretion, and on such terms as it deems just:
> (5) enter any judgment and make any order that ought to have been given or made, and make any other and further orders and grant any relief, including a remandment, a partial reversal, the order of a partial new trial, the entry of a remittitur, or the enforcement of a judgment, that the case may require.

because it allows an appellate court to reverse a case on grounds that were not preserved at trial or presented on appeal. If a reviewing court invokes rule 366(a)(5) in that manner, the plaintiffs allege, a litigant is deprived of notice and a hearing which cannot be remedied by a petition for rehearing under rule 367[2]. Additionally, Landers claims the rule is void for vagueness and provides no guidance to reviewing courts. The plaintiffs ask the court to declare the rule unconstitutional, to issue a permanent injunction against enforcing rule 366(a)(5) and for damages from the bank.

For the reasons that follow, the court holds that it lacks subject-matter jurisdiction over this case and does not reach the merits of the plaintiffs' arguments.

HISTORY

The facts underlying this case have been recited extensively in the Illinois reporters, *Champaign Nat'l Bank v. Landers Seed*, 165 Ill. App. 3d 1090 (4th Dist. 1988), *cert. denied*, 489 U.S. 1019 (1989) ("*Landers I*"); *Champaign Nat'l Bank v. Landers Seed*, 194 Ill. App. 3d 1019 (4th Dist. 1990) ("*Landers II*"), and will be restated here only briefly.

In 1984, the bank brought suit on a promissory note against Landers Seed and the individual members of the Landers family as guarantors. A jury returned verdicts for the bank for amount of the principal and interest outstanding on the note and for the Landers on their

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[2] Rule 367 allows for "a petition for rehearing . . . within 21 days after filing of the opinion. . . . " Ill. Ann. Stat. ch. 110A, para. 367(a) (Smith-Hurd 1985 & Supp. 1992).

counter-claim. The appellate court affirmed the jury verdict on the note but reversed the verdict on the counterclaim as against the manifest weight of evidence. *Landers I*, 165 Ill. App. 3d at 1097-98.

The plaintiffs petitioned the appellate court for rehearing in *Landers I* and claimed the court did not have the power to decide the case on that basis under rule 366(b)(2)(iii)[3] because the bank had not raised on appeal the issue of manifest weight of the evidence. The petition for rehearing was denied on March 16, 1988. Landers presented the same points of error in a petition for leave to appeal to the Illinois Supreme Court, that was denied October 6, 1988. The plaintiffs petitioned the United States Supreme Court for a writ of certiorari under 28 U.S.C. §1257. That petition, too, was denied on February 21, 1989.

Still claiming the decision in *Landers I* was void, the plaintiffs sought collateral relief from the judgment under Ill. Ann. Stat. ch. 110, para. 2-1401 (Smith-Hurd 1983 & Supp. 1992). The appellate court affirmed denial of that claim and found subject-matter jurisdiction for its decision in *Landers I* under rule 366(a)(5). *Landers II*, 194 Ill. App. 3d at 1023, 1025. Thus, interpretation of rule 366(a)(5), the basis for this case (*Landers III*), first appeared in *Landers II*.

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[3] Rule 366(b)(2)(iii) reads, "A party may not urge as error on review of the ruling on [its] post-trial motion any point, ground, or relief not specified in the motion." Ill. Ann. Stat. ch. 110A, para. 366(b)(2)(iii) (Smith-Hurd 1985).

The plaintiffs petitioned the appellate court for rehearing and raised as points of error, among other things:

> Application of Supreme Court rule 366(a)(5) so as to permit reversal of the jury verdict in Landers' favor on grounds neither preserved at trial nor presented on appeal is contrary to fundamental principles of notice and opportunity for hearing secured by the due process clauses of the Fourteenth Amendment to the United States Constitution and Article I §2 of the Illinois constitution of 1970; and
>
> [The appellate] court's holding that the availability of rehearing under Supreme Court rule 367 satisfies due process is incorrect and contrary to United States Supreme Court precedents.

Appendix to Plaintiffs' Memorandum at tab 3, pp. iii and v (docket #19). The petition for rehearing in *Landers II* was denied on April 5, 1990. The plaintiffs raised these same issues regarding rule 366(a)(5) in their petition for leave to appeal to the Illinois Supreme Court. Appendix to Plaintiffs' Memorandum at tab 4, p. 3. The petition was denied on October 3, 1990. In *Landers II*, the plaintiffs did not petition the U.S. Supreme Court for certiorari for review of the state courts' interpretation of rule 366(a)(5). *Landers III* then was filed in the [sic] this court.

DISCUSSION

The United States Supreme Court has exclusive jurisdiction to review claims that a state statute is contrary to the U.S. Constitution, treaties or laws. 28 U.S.C. §1257;

D.C. Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415, 416 (1923). A district court is without authority to review final judgments of a state court in judicial proceedings. *Feldman*, 460 U.S. at 482.

An exception to this jurisdictional bar exists and "United States district courts . . . have subject-matter jurisdiction over general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state-court judgment in a particular case." *Id.* at 486. Thus, if a district court is asked to assess the validity of a rule promulgated in a nonjudicial proceeding, 28 U.S.C. §1257 does not bar the district court's jurisdiction. *Id.*

There is also an exception within this exception: "If the constitutional claims presented to the United States district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's [claim], then the district court is in essence being called upon to review the state-court decision. This the district court may not do." *Id.* at 483-484, n.16.

The plaintiffs assert the court has subject-matter jurisdiction under the first exception in *Feldman* because they are asking the court to review rule 366(a)(5) as promulgated by the Illinois Supreme Court in its administrative capacity and to declare it unconstitutional on its face, not as applied. The plaintiffs claim they are not seeking review of a final state-court judgment in a particular case.

The court rejects this characterization of the law suit. The plaintiffs also request monetary damages against the

bank for its reliance upon an allegedly unconstitutional rule. *See* Count iii of the first amended complaint (docket #3). Moreover, plaintiffs' reason for seeking declaratory and injunctive relief is because "[i]t would permit them to proceed with their damage action against the Champaign Nat'l Bank. . . . " Memorandum in Opposition to Defendants' Motions to Dismiss (docket #15) at 26. The plaintiffs' constitutional claims are intertwined with the judgment against them and, in essence, this court is asked to review the decision of the state court. *Feldman*, 460 U.S. at 483-84 n.16. This the court may not do.

The plaintiffs assert the state courts have not ruled on the constitutional questions presented in *Landers III* because they did not learn rule 366(a)(5) was the basis for the decision of *Landers I* until the appellate court issued *Landers II*. As previously noted, once the plaintiffs learned that rule 366(a)(5) was involved, they presented their constitutional challenges to the state courts in their petitions for rehearing and for leave to appeal to the Illinois Supreme Court. Contrary to the plaintiffs' assertion, those courts have ruled on the plaintiffs' questions.

When the Illinois Supreme Court denied leave to appeal in *Landers II*, the plaintiffs were challenging the constitutionality of a statute as interpreted in a "final judgment . . . rendered by the highest court of a State." 28 U.S.C. §1257. The next step should have been, as in *Landers I*, to petition the Supreme Court of the United States for a writ of certiorari pursuant to §1257. However, the plaintiffs did not do that. Although the plaintiffs attempt to characterize it differently, this case falls squarely within the prohibitions of 28 U.S.C. §1257 and

Feldman and this court does not have subject-matter jurisdiction.

IT IS THEREFORE ORDERED that the plaintiffs' first amended complaint is dismissed for lack of subject matter jurisdiction. All other pending matters are rendered moot.

Enter this 23rd day of November, 1992.

/s/ Harold A. Baker
HAROLD A. BAKER
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: February 4, 1994

BEFORE: **Honorable** Floyd R. Gibson, Circuit Judge*

Honorable Walter J. Cummings, Circuit Judge

Honorable Joel M. Flaum, Circuit Judge

No. 92-3984

LANDERS SEED COMPANY, INCORPORATED, MAXINE LANDERS, GLEN LANDERS, et al.,
Plaintiffs - Appellants

v.

CHAMPAIGN NATIONAL BANK, a National Banking Corporation, and SUPREME COURT OF THE STATE OF ILLINOIS,
Defendants - Appellees

Appeal from the United States District Court for the Central District of Illinois, Danville Division No. 92 C 2467, Harold A. Baker, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

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* The Honorable Floyd R. Gibson of the United States Court of Appeals for the Eighth Circuit is setting by designation.
(1061-110393)

APPENDIX D

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

A. United States Constitution, Amendment XIV, §1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction of the equal protection of the laws.

B. 28 U.S.C. §1343(a)(iii)

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> > (3) "to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States. . . . "

C. 28 U.S.C. §2201

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

D. 42 U.S.C. §1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

E. 28 U.S.C. §1257

> (a) Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) for the purposes of this section, the term "highest court of the state" includes the District of Columbia Court of Appeals.

F. Illinois Supreme Court Rule 366(a)(5)

> In all appeals the reviewing court may, in its discretion, and on such terms as it deems just: . . .
>
> (5) enter any judgment and make any order that ought to have been given or made, and make any other and further orders and grant

any relief, including a remandment, a partial reversal, the order of a partial new trial, the entry of a remittitur, or the enforcement of a judgment, that the case may require.

G. Rule 25, Fed.R.Civ.P.

(b) **Incompetency.** If a party becomes incompetent, the court upon motions served as provided in subdivision (a) of this rule may allow the action to be continued by or against his representative.

(c) **Transfer of Interest.** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the party to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

(d) **Public Officers; Death or Separation from Office.** (1) when a public officer is a party to an action in an official capacity and during its pendency dies, resigns, or ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substitute party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution. (2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
DANVILLE DIVISION

LANDERS SEED CO., INC.; MAXINE LANDERS; GLEN LANDERS; and CHARLES LANDERS, Plaintiffs, -vs- CHAMPAIGN NATIONAL BANK, a National Banking Corporation and the SUPREME COURT OF THE STATE OF ILLINOIS, Defendants.	No. 91-2467 **FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, APPROPRIATE EQUITABLE RELIEF, AND DAMAGES**

Plaintiffs, Landers Seed Co., Inc., Maxine Landers, Glen Landers, and Charles Landers, by their attorneys, hereby complain and allege as follows:

A. PARTIES

1. At all times relevant herein, Landers Seed Co., Inc., hereafter "Landers", was a closely held family corporation with the individually named plaintiffs as its principals doing business as a grain seed company with its principal office located in Sullivan, Moultrie County, Illinois.

2. Maxine Landers, Glen Landers, and Charles Landers were, at all relevant times herein, the individual

family members who comprised Landers Seed Co. as its stockholders, directors, and officers, and were also individual guarantors of all obligations incurred by Landers Seed Co. to the Champaign National Bank as hereafter more fully appears.

3. The defendant Champaign National Bank, hereafter "bank" is and was at all material times herein mentioned a national banking corporation with its banking house located in Champaign, Illinois.

4. The defendant Supreme Court of the State of Illinois is the court in which the supreme judicial power of the state of Illinois is vested under and by virtue of Article VI § 1 of the Illinois Constitution of 1970 and which court, pursuant to *Ill.Rev.Stat.* Ch. 110 § 1-104, is additionally administratively empowered to "make rules of pleading, practice and procedure for the Circuit, Appellate and Supreme Courts supplementary to, but not inconsistent with the provisions of (Code of Civil Procedure) . . . ", and, pursuant to such administrative, nonjudicial power, has made and promulgated what is known as Illinois S. Ct. Rule 3 66 (a) (5) appearing at *Ill.Rev.Stat.* Ch. 110A § 366(a) (5), hereafter Rule 366(a) (5), providing that on appeal, the Illinois Supreme and Appellate Courts have the power to

> enter any judgment and make any order that ought to have been given or made, and make any other and further orders and grant any relief, including a remandment, a partial reversal, the order of a partial new trial, the entry of a remittitur, or the enforcement of a judgment that the case may require.

5. Although not a party proper, the Illinois Appellate Court for the Fourth Judicial District, hereafter "appellate court", a judicial court of intermediate appellate review created and operating under and pursuant to the Constitution and laws of the state of Illinois and pursuant thereto empowered to employ Rule 366(a) (5) as hereafter more fully appears, is legally interested in the merits hereof.

6. Also, the Circuit Court for the Sixth Judicial Circuit, Moultrie County, Illinois, hereafter "circuit court", a trial court of general jurisdiction created and operating under and pursuant to the Constitution and laws of the state of Illinois as hereafter more fully appears, is not a party proper but has a legal interest in the merits hereof.

B. JURISDICTION

7. This action arises under federal law, particularly the Civil Rights Act of 1871, Title 42 U.S.C. § 1983 as hereinafter more fully appears.

8. This court has jurisdiction of this cause under and by virtue of Title 28 U.S.C. §§ 1331, 1343, 2201, and 2202, this being an action authorized by law to secure a declaration of rights respecting and appropriate redress for the deprivation under color of Illinois law, in particular Rule 366(a) (5), of rights secured by the Constitution of the United States on the grounds that said Rule on its face empowers a reviewing court in the state of Illinois to deprive a litigant before that court of liberty or property without notice or opportunity to be heard as hereafter more fully appears.

9. A case and controversy under 28 U.S.C. § 2201 exists between plaintiffs and defendants by reason of two judgments of the appellate Court entered under and pursuant to Rule 366(a) (5) as above quoted whereby, pursuant to the mandates of that court, the defendant bank with the aid, assistance, processes, and significant and overt encouragement of the circuit court and the judges and officials thereof, has secured, is in the process of securing, and intends to further secure property belonging to plaintiffs without plaintiffs having first had notice or an opportunity to be heard in violation of their rights to due process of law as hereafter more fully appears.

10. This court's jurisdiction is not barred or otherwise precluded by reason of the principles expressed in *Rooker v. Fidelity Trust Co.*, 263 U.S. 414 (1923) or *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), by the rules of claim or issue preclusion and full faith and credit expressed in28 U.S.C. § 1738, as no Illinois court has heard or adjudicated the constitutional claim presented herein; nor is it barred by any rule of abstention, there being no further judicial procedures or remedies available to plaintiffs under Illinois law to adjudicate the sole claim presented herein, to wit, the unconstitutionality of Rule 366(a) (5) as hereafter more fully appears.

C. CAUSES OF ACTION

COUNT I

§ 1983 - Declaratory Judgment

11. On June 29, 1987, in that certain action brought in the circuit court in case No. 84-L-4 entitled "Champaign National Bank v. Landers Seed Co., et al.", the

circuit court entered judgment on a jury verdict on defendant bank's Claim on a promissory note in the amount $724,637.37 and at the same time entered judgment on the jury verdict in favor of Landers Seed Company on its counterclaim against the bank for breach of contract in the amount of $60,833.31, a copy of the circuit court's judgment is attached hereto as Exhibit "A".

12. Landers filed both a post-trial motion in the circuit court and an appeal from the judgment to the appellate court, in case No. 4-87-0460, in which it claimed *inter alia* that the aforementioned verdicts for the bank and for Landers were inconsistent and illogical in that Landers had defended against the bank's claim on the promissory note on a theory of waiver and had at the same time counterclaimed against the bank for breach of a contract of which the note was a part, the elements of Landers' waiver defense to the bank's claim on the promissory note and the elements of its breach of contract counterclaim being exactly the same except that the contract claim required proof of consideration and the waiver defense did not.

13. The bank also filed a post-trial motion in the circuit court, and a cross appeal to the appellate court in aforementioned case No. 4-87-0460 in which it argued (i) that the bank's breach of contract was not the proximate cause of Landers' damages, (ii) that the jury was improperly instructed as to elements of Landers' damage and (iii) that parol evidence was improperly admitted to show breach of contract, but at no time in either the circuit court or in the appellate Court did the bank preserve or advance any other arguments respecting Landers' breach of contract counterclaim. Copies of the bank's post trial

motion in the circuit court and its entire brief in the appellate court are attached hereto as Exhibits "B" and "C" respectively.

14. The appeal and cross appeal from the aforementioned judgment of the circuit court, came on for oral argument in the appellate court at which time the bank, consistently with its preservation of issues in the circuit court, consistently with its post trial motion in the circuit court, consistently with its brief in the appellate court, and consistently with the evidence at trial, stated its position that there was sufficient evidence for the jury in the circuit court to have concluded that there had been a contract between the bank and Landers and that the bank had breached that contract, an acknowledgment of the bank's position being set forth in the opinion of the appellate court officially reported at 165 Ill.App.3d 1090 at 1093.

15. Thereafter, on January 21, 1988, the appellate court by and through a panel of three of its justices, issued its judgment and opinion in which it affirmed the circuit court's judgment on the jury verdict in favor of the bank on the promissory note, but reversed the circuit court's judgment on the jury verdict in favor of Landers on its breach of contract counterclaim on grounds altogether different from those preserved by the bank in the circuit court, presented by the bank in its post trial motion, and presented by the bank on appeal, holding instead that there was (i) "insufficient evidence of a contract" and (ii) the jury verdict in favor of Landers was "against the manifest weight of the evidence", with respect to which two grounds, Landers never had notice nor an opportunity to be heard. A copy of the appellate

court's judgment in case No. 4-87-0460 as officially reported at 165 Ill.App.3d 1090 is attached hereto as Exhibit "D" and is hereafter referred to as *"Landers I"*.

16. Nowhere in its opinion or judgment in *Landers I* did the appellate court explain how or pursuant to what authority it presumed to reach the grounds it reached to deprive Landers its judgment on a jury verdict on its breach of contract claim which grounds were never preserved at trial nor presented on appeal and with respect to which Landers never had notice or an opportunity to be heard by reason of which plaintiffs had no knowledge, information, or belief as to the purported legal basis or authority upon which the appellate court presumed to decide *Landers I*.

17. Thereafter Landers sought (i) rehearing in the appellate court, (ii) leave to appeal from the Illinois Supreme Court and (iii) certiorari from the U.S. Supreme Court on the grounds that the appellate court's judgment in *Landers I* deprived Landers of notice and an opportunity to be heard and, therefore, due process of law secured by the Fourteenth Amendment to the United States Constitution; but, all those forms of relief were summarily denied without hearing, argument, or adjudication, as evidenced by Exhibits "E", "F" and "G" attached hereto and incorporated by reference herein, and the mandate of the appellate court in *Landers I* issued to the circuit court as evidenced by Exhibit "H" attached hereto.

18. After Landers was unsuccessful in securing the forms of relief must described and pursuant to the appellate court's mandate in *Landers I*, Exhibit "H" hereto, the

bank reinstated the matter in the circuit court in aforementioned case No. 84-L-4 and sought summary judgment against the individually named plaintiffs, said plaintiffs having been severed from the action against Landers Seed Co., on the authority of the appellate court's judgment in *Landers I.*

19. In response to the bank's proceeding as just described in the circuit court in action 84-L-4, Landers Seed Co. filed a motion pursuant to Illinois Code of Civil Procedure § 2-1401, (*Ill.Rev.Stat.* Ch. 110 § 2-1401), collaterally attacking the judgment of the appellate court in *Landers I,* arguing (i) that said judgment was void and unenforcible by reason of that court having exceeded its subject matter jurisdiction as prescribed in Illinois S.Ct. Rule 366(b) (2) (iii) and Code of Civil Procedure § 2-1202 by deciding *Landers I* on grounds neither preserved in the circuit court nor advanced on appeal and (ii) that Landers was deprived the first principle of due process guaranteed by the Fourteenth Amendment of notice and an opportunity to be heard with respect to the grounds upon which the appellate court had reversed the judgment on the jury verdict in Landers' favor on its breach of contract claim in *Landers I.*

20. The circuit court granted summary judgment to the bank and against the individually named plaintiffs as guarantors of Landers Seed Company's indebtedness on the strength of the appellate court's judgment and opinion in *Landers I* and entered judgment denying Landers' motion pursuant to Code of Civil Procedure § 2-1401 for the understandable reason that it would not have been consistent with the orderly administration of justice for a trial court to find a judgment of an appellate court to be

void in the particulars described in the proceeding paragraph, a copy of which judgments of the circuit court are attached hereto as Exhibits "I" and "J" respectively.

21. Thereafter, plaintiffs perfected a second appeal to the appellate court in what became case No. 4-89-0464 from the circuit court's summary judgment against the plaintiffs herein and judgment denying Landers Seed Co. relief pursuant to Illinois Code of Civil Procedure § 2-1401, which appeal was decided on March 15, 1990, and officially reported at 194 Ill.App.3d 1019, a copy of which official report is attached hereto as Exhibit "K" and is hereafter referred to as *Landers II* and by reason of which decision plaintiffs learned for the first time the appellate court's purported justification and Authority for its having decided *Landers I* on grounds never preserved at trial nor presented on appeal and with respect to which Landers had no notice or opportunity to be heard.

22. In its judgment and opinion in *Landers II* affirming the circuit court's judgment denying Landers' Petition for Relief Pursuant to Code of Civil Procedure § 2-1401, the appellate court acknowledged that it had decided *Landers I* on grounds never preserved at trial nor presented on appeal, (Ex. K, 194 Ill.App.3d at 1022), but held that it had the power and authority to do so pursuant to the provisions of Rule 366(a) (5), hereinabove set forth, and on the grounds that Landers had the right to and did exercise the right to seek rehearing pursuant to Illinois S.Ct. Rule 367 in the appellate court in *Landers I*, notwithstanding that under Rule 367 there is no obligation in the appellate court to rehear the case and the

appellate court did not in fact rehear *Landers I* as evidenced by Exhibit "E" attached hereto.

23. Subsequent to the appellate court's judgment in *Landers II*, Landers sought both rehearing in the appellate court and leave to appeal to the Illinois Supreme Court, arguing that in giving an appellate court the authority to reverse a judgment on a jury verdict on grounds never preserved at trial nor raised on appeal and with respect to which a litigant had neither notice nor an opportunity to be heard, Rule 366(a) (5) was void and unconstitutional on its face as necessarily conferring on a reviewing court unrestrained and unfettered authority to deprive a litigant the first principle of due process of law, notice and an opportunity for hearing before any deprivation of property or liberty.

24. Both the appellate court and the Illinois Supreme Court denied relief without further hearing, argument or adjudication as evidenced by Exhibits "L" and "M" attached hereto and incorporated by reference herein and the mandate of the appellate court in *Landers II* issued to the circuit court on the 26th day of October, 1990, as evidenced by Exhibit "N".

25. By reason of Rule 366(a) (5), as promulgated and by its having mandated the judgments in *Landers I* and *Landers II*, plaintiffs have been deprived their right, privilege, and immunity secured by the Fourteenth Amendment not to be deprived property in the form of their claim against the bank for breach of contract, such claim made tangible by the jury verdict in Landers' favor, without due process of law in the elementary form of notice and opportunity for hearing.

26. After the mandate in *Landers II* issued to the circuit court, and as a direct and proximate result thereof, the defendant bank enlisted and secured, continues to enlist and secure and intends in the future to enlist and secure, aid, assistance and significant overt encouragement from officers and agents of that court including the judges thereof and pursuant thereto has acted and will continue to act jointly and in concert with said court and officials thereof and has proceeded to and continues to execute its judgment against the individual plaintiffs herein, said judgment made possible by and dependent upon Rule 366(a) (5) as aforesaid which Rule is void and unconstitutional for the reasons herein set forth.

27. No judicial remedies remain available to plaintiffs in any Illinois court by reason of which Illinois can claim no interest in comity or federalism which would require this court to abstain, and, notwithstanding plaintiffs having brought the unconstitutionality of Rule 366(a) (5) to the attention of both the appellate and Illinois Supreme Courts by petitions for rehearing and leave to appeal respectively, both courts refused to hear, let alone adjudicate, plaintiffs' constitutional claim respecting said Rule by reason of which no judgment of any Illinois Court arising out of the case and controversy alleged herein exists addressing the constitutionality of Rule 366(a) (5), by further reason of which, there is no Illinois judgment entitled to preclusive effect under and by virtue of 28 U.S.C. § 1738.

28. Moreover, by reason of Rule 366(a) (5), any Illinois appellate court has carte blanche to do anything it wants to do to secure whatever result it wants to secure altogether without regard for the constraining and

restraining strictures of due process of law requiring notice and opportunity for hearing and said rule thereby necessarily subjects litigants and all those who in the future might become litigants in the appellate court of the state of Illinois to the exercise of judicial lawlessness and abuse for which said litigants and future litigants will have no remedy at law unless this court declares Rule 366(a) (5) to be void and unconstitutional on its face.

WHEREFORE, plaintiffs pray for judgment as follows:

a. A judicial declaration that Rule 366(a)(5) is void and unconstitutional on it face as permitting unrestrained discretion in the appellate courts to enter judgments without notice opportunity for hearing in violation of the Due Process Clause of the Fourteenth Amendment.

b. A judicial declaration that the rehearing procedure prescribed by Rule 367 does not without a rehearing in fact being and granted cure a deprivation of due process created under pursuant to Rule 366(a) (5).

c. Court costs, reasonable attorney's fees pursuant to 42 U.S.C. § 1988; and such other and further relief as to the court seems just and appropriate under the circumstances.

COUNT II

§ 1983 - Appropriate Equitable Relief - Illinois Supreme Court

1-28. Plaintiffs incorporate by reference as if stated verbatim herein paragraphs 1 - 28 as paragraphs 1 - 28 of this Count II.

29. Accordingly, plaintiffs herein have been subjected to, are being subjected to, and stand further to be subjected to immediate and irreparable harm for which they have no adequate remedy at law to redress by reason of which they must seek to invoke this court's powers of equity and pursuant thereto seek immediate preliminary and permanent injunctive relief, preliminarily and permanently enjoining and restraining the defendant Illinois Supreme Court from continuing to enforce Rule 366(a) (5) which is void and unconstitutional on its face as necessarily permitting appellate courts unrestrained discretion to deprive litigants of property without due process of law.

WHEREFORE, plaintiffs pray for judgment as against the defendant Illinois Supreme Court in the form of preliminary and permanent injunctive relief requiring that said court cease enforcing Rule 366(a) (5), court costs, reasonable attorney's fees pursuant to 42 U.S.C. § 1988 and such other and further relief as the court deems just and appropriate under the circumstances.

COUNT III

§ 1983 - Damages - Champaign National Bank, Acting Under Color and Authority of Unconstitutional State Law and in Concert With State Judiciary.

1-24. Plaintiffs incorporate by reference as if stated verbatim herein paragraphs 1 - 8 and 11 - 26 as paragraphs 1 - 24 of this Count III.

25. In executing the judgment of the circuit court in concert with and with the significant encouragement,

assistance, and aid of officers and officials of the circuit court all on the strength and as a direct and proximate result of the unconstitutional mandates in *Landers I* and *II*, the bank has secured possession of substantial assets owned by Landers Seed Co. and the individual plaintiffs including over 330 acres of farm land, commercial property, and the family home and farmstead of plaintiffs Glen Landers and Maxine Landers and continues to proceed against said assets including assets which Glen Landers and Maxine Landers had conveyed to a trust in 1983 and, by reason thereof, Landers Seed Co., Glen Landers, Maxine Landers, and Charles Landers have been damaged and continue to be damaged in the loss of their property in a sum according to proof, such loss having been made possible by the denial to Landers Seed Company and derivatively Glen Landers, Maxine Landers, and Charles Landers of due process of law owing to the facial unconstitutionality of Rule 366(a) (5) pursuant to which the appellate court's mandates in *Landers I* and *Landers II* were forthcoming.

26. By reason of the defendant bank having secured substantial property and assets belonging to the plaintiffs as the direct and proximate result of the Illinois Supreme Court's administrative promulgation of Rule 366(a) (5), it has necessarily secured property and assets it would not have secured but for said Rule which is void and unconstitutional on its face, and in so securing property and assets belonging to the plaintiffs, the defendant bank with aid, assistance, processes and significant and overt encouragement of the circuit court, has deprived and is continuing to deprive plaintiffs of property without due

process of law all to their damage in a sum according to proof.

WHEREFORE, plaintiffs pray for judgment against the defendant Champaign National Bank in a sum according to proof, court costs, reasonable attorney's fees pursuant to 42 U.S.C. § 1988 and such other and further relief as the court deems just and appropriate under the circumstances.

Respectfully Submitted:

LAW OFFICES OF
JOHN H. BISBEE
437 North Lafayette Street
Macomb, Illinois 61455
Telephone (309) 833-1797

DATED: December 9, 1991

/s/ John H. Bisbee
JOHN H. BISBEE

CERTIFICATE OF MAILING

I hereby certify that I have on this 9th day of December, 1991, deposited a true and correct copy of the foregoing FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, APPROPRIATE EQUITABLE RELIEF, AND DAMAGES in the United States mails, postage prepaid to Mr. Jim Evans, Evans & Froelich, 44 Main Street, P.O. Box 737, Champaign, Illinois 61820

/s/ John H. Bisbee

PLAINTIFFS DEMAND TRIAL BY A JURY OF 6 (SIX) ON ALL ISSUES TRIABLE BY JURY.

APPENDIX F

THE CHAMPAIGN NATIONAL BANK, Plaintiff-Appellee and Cross-Appellant, v. LANDERS SEED COMPANY, INC., *et al.*, Defendants-Appellants and Cross-Appellees.

Fourth District No. 4-87-0460

Affirmed in part and reversed in part.

Opinion filed January 21, 1988. – Rehearing denied March 16, 1988.

Appeal from the Circuit Court of Moultrie County; the Hon. Worthy B. Kranz, Judge, presiding.

Law Offices of John H. Bisbee, of Macomb (John H. Bisbee, of counsel), for appellants.

James W. Evans, P.C., of Evans & Froehlich, of Champaign, for appellee.

JUSTICE LUND delivered the opinion of the court:

The plaintiff Champaign National Bank, a national banking association, and defendant Landers Seed Company, Inc., both appeal from a judgment on a jury verdict returned in the circuit court of Moultrie County.

Plaintiff brought an action on a promissory note against defendant, and the jury returned a verdict in favor of the plaintiff for $724,637.37. Defendant counterclaimed on a theory of contract to make future loans, and the jury returned a verdict in favor of defendant, against plaintiff, for $60,833.31. Judgment on the verdicts was entered.

A condensed statement of defendant's position on appeal is (1) the trial court erred in not entering judgment

n.o.v. in favor of the defendant because the evidence establishes waiver as to the plaintiff's right to call the debt evidenced by the promissory note; and (2) the verdicts are inconsistent, and the verdict in favor of the plaintiff must be set aside and a new trial granted. Defendant basically claims any judgment against it is against the manifest weight of the evidence.

Plaintiff contends (1) the trial court allowed evidence in violation of the parol evidence rule; (2) the trial court erred in not granting its motion to set aside the judgment in favor of defendant for $60,833.31 as being against the manifest weight of the evidence; and (3) the trial court erred in giving jury instruction No. 23, which provided for consideration of, in plaintiff's opinion, inappropriate items of contract damages.

Defendant was a seed business operated by Charles Landers in Sullivan, Illinois. Plaintiff originally participated in loans defendant obtained through the First National Bank of Sullivan. On August 23, 1982, the plaintiff became a direct lender to defendant, and, at that time, the $1,200,000 representing plaintiff's share of the participating indebtedness to the First National Bank of Sullivan, plus interest due on the $1,200,000 in the amount of $81,126.83, was transferred to a 120-day promissory note due plaintiff from defendant in the amount of $1,281,126.83. This note was secured by various guarantees and mortgages executed by Charles Landers, his wife, his father, and his mother. This note was renewed for 120 days on December 21, 1982, and it is uncontested that the unpaid principal and interest at the time of the verdict was $724,637.37.

The plaintiff called the debt in July 1983, directing liquidation of the corporation. On January 16, 1984, plaintiff filed its complaint seeking judgment on the note. Defendant eventually filed counterclaims which, at trial time, were based on breach of contract, fraud, and bad-faith dealings. The allegations in the counterclaims also resulted in affirmative defenses of waiver, estoppel, and bad faith.

Basically, all of defendant's counterclaims and defenses are based on allegations of promises made to the Landers at the August 23, 1982, meeting where notes and security documents were executed. The alleged commitment was to continue financing Landers Seed Company as long as there was progress towards profitability and a chance at profitability. These so-called promises are the basis for the counterclaim based on contract, as well as the basis for all other defenses and counterclaims.

Some discussion of the evidence is necessary. In answer to a question as to whether Lee O'Neill, the plaintiff's agent, made any representations respecting profitability at the August 23, 1982, meeting, Charles Landers stated:

> "As far as any, we didn't talk about any dollars, no. All we talked about was the idea that as long as we made progress towards profitability, had a chance at profitability, paid our interest and worked with Lee, gave him the information he wanted from us that he would not collect on the note."

He further stated in answer to questions:

> "A. Well, I think he gave us the assurances at that particular point in time that they would

> forebear; they would be willing to work with our firm until such time as we became profitable or even had a chance of becoming profitable, as long as we paid the interest and we worked with them and we did the things that they wanted us to do, they were going to stay with us. And he understood that was going to take some time. He understood that might take up to three years.
>
> Q. Did he say up to three years?
>
> A. That was in the discussion and we talked about it and I think he understood and yes, I believe he said it."

According to Charles Landers, the assurances were required before the Landers executed the various documents on August 23, 1982. O'Neill denied the execution of the documents was conditioned on any assurances by him, and he denied offering terms of any kind. He did testify that he had indicated:

> "[T]he bank was willing to work with the corporation as long as the corporation was performing and as long as the corporation was moving toward profitability, as long as the financial structure of the corporation and the financial structure of the guarantors was not adversely changed."

We reverse the $60,833.31 judgment against the plaintiff and affirm the $724,637.77 judgment against the defendant for two reasons.

INSUFFICIENT EVIDENCE OF CONTRACT

We are aware that counsel for plaintiff appeared to admit sufficient evidence existed for a jury determination of the fact issue relating to the contract count of the defendant's countercomplaint. However, a contrary argument was made in the brief filed by the plaintiff. We have examined the trial evidence, and for purposes of creating proper precedent, have elected to base our opinion upon the evidence and the law, not upon the opinions of counsel.

•1 The terms of a contract must be reasonably certain. Some terms may be missing or left to be agreed upon, but if the essential term or terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract. Restatement (Second) of Contracts §33 (1981).

•2 An agreement to continue to refinance or roll over a debt appears similar to an oral contract to lend money in the future. A valid cause of action for breach of an oral contract to lend money in the future is recognized in Illinois. (*Wait v. First Midwest Bank/Danville* (1986), 142 Ill. App. 3d 703, 707, 491 N.E.2d 795, 800; *Bank of Lincolnwood v. Comdisco, Inc.* (1982), 111 Ill. App. 3d 822, 444 N.E.2d 657.) The party claiming such a contract must show that the alleged agreement contains sufficient definitiveness to be enforceable. (*Wait*, 142 Ill. App. 3d at 708, 491 N.E.2d at 801; *Carrico v. Delp* (1986), 141 Ill. App. 3d 684, 688, 490 N.E.2d 972, 975.) In *Wait* and *Carrico*, our court cited *McErlean v. Union National Bank* (1980), 90 Ill. App. 3d 1141, 414 N.E.2d 128, where it was held an agreement to loan money in the future was enforceable

only if it contemplated the terms upon which the future loan should be made. The *McErlean* court stated:

> "These terms would include, for example, the intended duration of the line of credit; the applicable rate of interest to be charged for any loan emanating from such an agreement, or the basis for how such interest would be ascertained; what duration or date or dates were contemplated for maturity of such loans; and what mode or rate of repayment was contemplated, *i.e.*, whether the entire amount would be repayable or if repayment in installments would be acceptable." 90 Ill. App. 3d at 1146, 414 N.E.2d at 132.

•3 We recognize that in some fact situations "duration" can be inferred based on custom (*Wait*, 142 Ill. App. 3d at 709, 491 N.E.2d at 801), and part performance of an agreement may remove uncertainty and establish an enforceable contract. (*Yoder v. Rock Island Bank* (1977), 47 Ill. App. 3d 486, 491, 362 N.E.2d 68, 72.) We find that this cannot be done under the facts established by the evidence in the present case.

According to Charles Landers' testimony, O'Neill agreed not to collect on the note "as long as we make progress toward profitability, had a chance at profitability." Who is to judge the element of "progress towards profitability," or the element of "chance of profitability?" As will be discussed in more detail later in this opinion, the evidence indicated a loss by defendant of $375,551 for the fiscal year ending June 30, 1982, and a loss of $854,492 for the fiscal year ending June 30, 1983. The corporate debts exceeded assets on June 30, 1983, by $1 million. Charles Landers had failed in his projection as

to corporate income in the fall of 1981, in the spring of 1982, and at various times during the 1982-83 fiscal year.

No cost of money terms were included in the alleged agreement; no terms exist as to additional capital advances or duration of loans; maturity dates were not provided; mode or rate of repayment was not contemplated.

Previous decisions upholding oral contracts to loan money involved facts which were not necessarily in conflict with the parol evidence rule. Recognizing the possibility of an oral contract in the present case, to renew notes in the future, appears to necessarily create an exception to the rule. The promissory note provides for payment in 120 days after date and also specifically allows for collection on default or if the lender should deem itself insecure. Such terms appear inconsistent with an oral agreement to continue to refinance.

•4 The parol evidence rule is not a rule of evidence but a rule of substantive law. Prior written and oral agreements are, by the new written contract, made ineffective. There can be partly written agreements and partly oral agreements. (Restatement (Second) of Contracts §213 (1981).) In the present case, the written instruments provide for collection with different terms than the suggested oral agreement.

The exception we recognize to the parol evidence rule must not be so broad as to create a waiver of the requirements of certainty and definiteness in contracts. Any other holding would invite havoc to the world of financing.

We find that the facts before the trial court are not sufficient to provide the necessary definitiveness. We further find that the so-called contract did not contemplate the terms of future loans or refinancing of existing loans. As a result, a contract cannot exist as a matter of law, and the jury verdict against plaintiff must be reversed. This holding is consistent with our recent opinion in *McClellan v. Banc Midwest* (1987), 164 Ill. App. 3d 304.

Defendant argues that the affirmative defense of waiver was a necessary result of the jury's verdict on the contract claim of the counterclaim. Corbin on Contracts (3A A. Corbin, Contracts §752, at 480 (1960)) is cited for the proposition that if a vendor "merely states to the purchaser that he does not insist on payment on time, he thereby eliminates it as a condition." Corbin is cited further for the proposition that if a vendor eliminates the condition in exchange for consideration, and consideration is given, there is still waiver, but it is also a modification by a substitute contract.

In the present case, defendant would have us recognize a waiver of the right to collect an obligation based on the theory the plaintiff received consideration in the nature of defendant allowing a direct relationship between defendant and plaintiff. It is suggested that the loan participation status did not give plaintiff direct rights against defendant.

•5 The only evidence of the participation agreements between the First National Bank of Sullivan and the Champaign National Bank is defendant's exhibit No. 12, which is a certificate of participation dated October 8, 1981. This relates to a $120,000 payment of Champaign

National Bank's participation in a loan of $120,000 made to Landers Seed Company evidenced by a note dated October 8, 1981. While the certificate appears to reserve collection decisions with the Sullivan bank, the Sullivan bank acknowledges holding a *pro rata* share in all collateral and guarantees for the Champaign bank. An obligation of good faith was imposed on the Sullivan bank in its participation dealings with the Champaign National Bank. (Ill. Rev. Stat. 1985, ch. 26, par. 1-203.) The argument that plaintiff did not have effective remedies against defendant and guarantees prior to August 23, 1982, is not established by the evidence and is without merit.

On the issue of waiver, defendant cites *John Kubinski & Sons, Inc. v. Dockside Development Corp.* (1975), 33 Ill. App. 3d 1015, 339 N.E.2d 529 (which involved time of performance of a dredging contract), *Hart v. Lyons* (1982), 106 Ill. App. 3d 803, 436 N.E.2d 723, *Will v. Will Products, Inc.* (1982), 109 Ill. App. 3d 778, 441 N.E.2d 343 (both of which involved time is of the essence clauses in real estate contracts), *Pantle v. Industrial Comm'n* (1975), 61 Ill. 2d 365, 335 N.E.2d 491 (which held no waiver of the time limitations in filing a claim for workers' compensation), *Aetna Life Insurance Co. v. Sanford* (1902), 200 Ill. 126, 65 N.E. 661 (which dealt with the late payment of a life insurance premium), and *Anderson v. Creighton* (1975), 26 Ill. App. 3d 375, 325 N.E.2d 85 (which involved the waiver of an age condition for a life insurance policy).

Restatement (Second) of Contracts (Restatement (Second) of Contracts §84 (1981)) applies to the law of waiver. A subnote to that section provides as follows:

> "[*d.*] *Conditions which may be waived.* The rule of Subsection (1) applies primarily to conditions which may be thought of as procedural or technical, or to instances in which the non-occurrence of condition is comparatively minor. Examples are conditions which merely relate to the time or manner of the return performance or provide for the giving of notice or the supplying of proofs. Insurance policies ordinarily contain conditions of notice and proof of loss and of time for suit; and guarantors, endorsers and other sureties may be discharged by an agreement varying the duty of the principal debtor, by failure of diligence in presentment or prosecution, or by failure to give a required notice. In such cases, even though a promise to disregard the non-occurrence of the condition subjects the promisor to a new duty, the new duty is not regarded as significantly different from the old and the promise is binding without consideration, reliance, or formality. See, *e.g.*, Uniform Commercial Code §3-606, Comment 2." Restatement (Second) of Contracts §84, comment *d*, at 219 (1981).

•6 The right to collect a debt when due is not a procedural or technical right, and the change in the right to collect is significantly different from the terms of the written contract, *i.e.*, the promissory note. Waiver cannot apply to the facts in evidence in the present case.

THE VERDICT FINDING THAT PLAINTIFF VIOLATED TERMS OF THE ALLEGED CONTRACT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE

Champaign National Bank was participating in the defendant's loans to the extent of $500,000 as of September 1981. O'Neill met with Charles Landers in September 1981 and was told that defendant would show a profit in excess of $50,000 for the fiscal year ending June 30, 1982. In April 1982, the plaintiff had loan participations to the extent of $1 million, and Charles Landers asked for $200,000 more. At that time, Landers estimated losses at $100,000 for the fiscal year. Infusion of capital from outside sources was recommended by O'Neill.

At the April 1982 meeting, Landers projected 1982-83 fiscal year profits to be between $50,000 and $55,000. The certified public accountant's report showed the loss for the fiscal year ending June 30, 1982, to be $378,551. An accompanying note criticized the method of computing inventory value, suggesting overevaluation, thus substantially reducing the amount of the loss.

From August 23, 1982, until July 1, 1983, O'Neill and Charles Landers were in frequent contact. O'Neill was to be furnished with monthly financial reports. The $1,281,126.83 was evidenced by a new note on December 21, 1982. Interest was paid monthly through February 1983, but not thereafter. Principal payments were made from the sale of property owned by Charles Landers' parents. According to O'Neill, and not refuted by Charles Landers, there was a meeting on March 29, 1983, during which O'Neill expressed concern and suggested finding a buyer for defendant. Landers, on March 29, indicated there would be a loss for the fiscal year.

On May 12, 1983, Landers requested an additional $300,000 loan. It was not given. Landers was selling inventory to pay overhead expenses, and the cash flow problem was critical.

On July 1, 1983, a meeting was held with Charles Landers indicating the loss for fiscal year ending June 30, 1983, would be $500,000. Landers provided a 1983-84 fiscal year projection which indicated two scenarios, one showing an $800 profit and one showing a $73,000 projected loss.

The eventual CPA report shows a fiscal year loss of $854,492 and stated current liabilities exceeded current assets by $1,003,144.

•7 A decision by plaintiff that the defendant could not become profitable would, under the facts presented, be a sound business judgment, and any holding to the contrary would be against the manifest weight of the evidence. Charles Landers' projections were never in the ballpark. His failure to use the realistic value of inventory in the fiscal year ending June 30, 1982, distorted the net loss. According to the testimony of defendant's CPA, the loss should have been increased $416,000. Not only were Charles Landers' projections erroneous, but he had used poor judgment in overvaluing inventory for purposes of determining 1982 losses.

Plaintiff's actions were reasonable and justifiable even if an agreement had existed.

We affirm the judgment in favor of plaintiff and reverse and vacate the judgment in favor of defendant.

Affirmed in part; reversed in part.

GREEN, P.J., and SPITZ, J., concur.

APPENDIX G

STATE OF ILLINOIS

Appellate Court

FOURTH DISTRICT

SUPREME COURT BUILDING

SPRINGFIELD 62701-1792

CLERK OF THE COURT
(217) 782-2586

RESEARCH DIRECTOR
(217) 782-3528

DATE: 03/16/88

RE: Champaign National Bank v. Landers Seed Co., et al
General No.: 4-87-0460
Moultrie 84L4

TO COUNSEL:

The court today denied the petition for rehearing filed in the above entitled cause.

The mandate of this court will issue in 7 days to the Clerk of the Circuit Court unless an affidavit of intent to seek review in the Illinois Supreme Court (Rule 368(b)) is filed in this court.

DARRYL PRATSCHER, Clerk
Appellate Court
Fourth District

DP:mcb

TO: John H. Bisbee
Law Offices of John H. Bisbee
427 N. Lafayette Street
Macomb, Illinois 61455

James W. Evans, Ltd.
Evans & Froehlich
44 Main St., P.O. Box 737
Champaign, IL 61820

APPENDIX H

October 6, 1988

Mr. John H. Bisbee
Attorney at Law
437 N. Lafayette St.
Macomb, IL 61455

No. 66901 – The Champaign National Bank, etc., respondent, v. Landers Seed Co., Inc., petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition to appeal as a matter of right or leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1988.

APPENDIX I

THE CHAMPAIGN NATIONAL BANK, Plaintiff and Counterdefendant-Appellee, v. LANDERS SEED COMPANY, INC., *et al.*, Defendants and Counterplaintiffs-Appellants (Charles Landers *et al.*, Defendants-Counterplaintiffs). – THE CHAMPAIGN NATIONAL BANK, Plaintiff and Counter-defendant-Appellee, v. LANDERS SEED COMPANY, INC., *et al.*, Defendants and Counterplaintiffs-Appellants.

Fourth District Nos. 4–89–0464, 4–90–0023 cons.

Judgments affirmed.

Opinion filed March 15, 1990. –
Rehearing denied April 5, 1990.

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Appeal from the Circuit Court of Moultrie County; the Hon. John P. Shonkwiler, Judge, presiding.

Law Offices of John H. Bisbee, of Macomb (John H. Bisbee, of counsel), for appellants.

James W. Evans, Ltd., and Evans & Froelich, both of Champaign, for appellee.

JUSTICE LUND delivered the opinion of the court:

The genesis of this dispute was the entering of a loan agreement between the Champaign National Bank (hereinafter Bank) and Landers Seed Co., Inc. (hereinafter Landers). As part of the agreement, four individuals had to sign as personal guarantors of the loan. They were: Charles and Lorelyn Landers and Charles' parents, Glen

and Maxine Landers. (For the sake of clarity, the individuals will henceforth be, at times, referred to by first names.)

On January 16, 1984, the Bank filed its complaint on the promissory note in the circuit court of Moultrie County. The case against Landers was severed from that against the guarantors. After a jury trial, judgment was entered for the Bank on the note in the amount of $724,637.77. Judgment was also entered for Landers for breach of an oral contract in the amount of $60,833.31. Both parties appealed.

This court in *Champaign National Bank v. Landers Seed Co.* (1988), 165 Ill. App. 3d 1090, 519 N.E.2d 957, *cert. denied* (1989), ___ U.S. ___, 103 L. Ed. 2d 199, 109 S. Ct. 1138 (*Landers I*), reversed the judgment for Landers and affirmed that for the Bank. This court's mandate issued on November 30, 1988.

The Bank then proceeded against Charles, Lorelyn, Glen, and Maxine. It filed motions for summary judgment in December 1988. Glen, Maxine, and Charles filed motions seeking permission to file additional affirmative defenses, which were denied. On February 21, 1989, Landers filed, pursuant to section 2 - 1401 of the Code of Civil Procedure (Code) (Ill. Rev. Stat. 1987, ch. 110, par. 2 - 1401), a petition which asserted this court's decision in *Landers I* was void as being beyond the scope of our authority, and requested the trial court to refuse to give any effect to the decision. On May 5, 1989, the circuit court entered orders denying Landers' petition and granting the Bank judgments against Charles, Lorelyn, Glen, and Maxine. Lorelyn did not appeal. Landers now

appeals the denial of its section 2 - 1401 petition. Charles, Glen, and Maxine (defendants) appeal the denial of their request to file additional affirmative defenses and the granting of the Bank's summary judgment motions.

A

We first address the question of whether our decision in *Landers I* was void. The facts relating to the merits of the dispute on the note are set forth in *Landers I.*

In that appeal, the Bank, in its cross-appeal, alleged (1) the trial court erred by allowing evidence in violation of the parol evidence rule; (2) the evidence presented was legally insufficient to establish that the Bank's breach of the asserted oral contract caused the failure of Landers; and (3) there were errors with the instructions. At oral argument before our court in *Landers I,* counsel for the Bank appeared to have admitted sufficient facts were present at trial to justify the jury finding an oral contract existed. The Bank's counsel attacked the jury verdict, contending that admission of the evidence relating to an oral contract was a violation of the parol evidence rule. He argued that none of the evidence was admissible to reform a written contract, and that the written contracts were the various debt instruments.

In *Landers I,* this court, admitting so in the opinion, decided the case on grounds not argued on appeal by the Bank or Landers. This court determined that the facts presented by Landers failed to establish the existence of a valid oral contract. This holding is consistent with this court's decision in *McClellan v. Banc Midwest* (1987), 164

Ill. App. 3d 304, 517 N.E.2d 762, which was filed approximately one month prior to *Landers I* being filed. This court also determined, as an alternative ground, that the jury's decision that the contract was breached was against the manifest weight of the evidence.

Landers believes this order is void as being an improper exercise by the court and has so maintained in its petition for rehearing, petition for leave to appeal to the Illinois Supreme Court, writ of *certiorari* to the United States Supreme Court and, now, its petition under section 2 - 1401 in the trial court. Landers advances four reasons for the *Landers I* order being void. These are: (1) since the grounds relied on by this court were not properly preserved by the Bank, this court was without subject-matter jurisdiction to decide the issue; (2) Landers was given no notice concerning the issue and was not given an opportunity to be heard on this issue; (3) the court's procedure violated Landers' due process rights; and (4) this court's decision usurps Landers' right to a jury trial.

• 1 In order to have a valid judgment, the court must have both jurisdiction over the subject matter of the litigation and jurisdiction over the parties. (*In re Marriage of Verdung* (1989), 126 Ill. 2d 542, 547, 535 N.E.2d 818, 820; *State Bank v. Thill* (1986), 113 Ill. 2d 294, 308, 497 N.E.2d 1156, 1161.) Landers maintains failure to have subject-matter jurisdiction will result in any order being void.

Landers observes that this court has subject-matter jurisdiction as such, because Supreme Court Rule 301 (107 Ill. 2d R. 301) allows appeal of all final judgments. However, it believes Rule 366(b)(2)(iii) (107 Ill. 2d R. 366(b)(iii)) and section 2 - 1202 of the Code (Ill. Rev. Stat.

1987, ch. 110, par. 2 - 1202) provide how that review is to be exercised. Since the Bank did not comply with these provisions, Landers believes this court exceeded its jurisdiction and the decision is void.

Supreme Court Rule 366 sets forth the power of the reviewing court and the scope of permissible review. It provides in part:

> "In all appeals the reviewing court may, in its discretion, and on such terms as it deems just,
>
> * * *
>
> (5) enter any judgment and make any order that ought to have been given or made, and make any other and further orders and grant any relief, including a remandment, a partial reversal, the order of a partial new trial, the entry of a remittitur, or the enforcement of a judgment, that the case may require." 107 Ill. 2d R. 366(a)(5).

The first case to discuss the language of this rule was *Hux v. Raben* (1967), 38 Ill. 2d 223, 230 N.E.2d 831. There, in a situation somewhat analogous to ours, the appellate court was asked to review the propriety of an entry of an order of specific performance. The appellate court, on its own, determined the matter should be reversed because the contract was not sufficiently definite. One party appealed to the supreme court, arguing the appellate court exceeded its authority. The supreme court initially observed that the appellate court briefs raised the issue of the adequacy of the contract. It then observed:

> "A further word is appropriate, however, in view of the sweeping character of the attack on

the judgment of the appellate court. The last sentence of Rule 341(e)(7) of the rules of this court (36 Ill. 2d 138), 'Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing', states an admonition to the parties, not a limitation upon the jurisdiction of the reviewing court. The distinction clearly appears when that sentence is read in conjunction with Rule 366, which deals with the powers of a reviewing court and the scope of review. Rule 366 provides: '(a) *Powers.* In all appeals the reviewing court may, in its discretion, and on such terms as it deems just * * * (5) give any judgment and make any order that ought to have been given or made, * * * '. (36 Ill. 2d 159.) A similar thought is expressed in the provision of Rule 615 with respect to the review of criminal cases: 'Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.' 36 Ill. 2d 182.

These provisions recognize that the responsibility of a reviewing court for a just result and for the maintenance of a sound and uniform body of precedent may sometimes override the considerations of waiver that stem from the adversary character of our system. [Citations.] There are limitations. '[A]n appellate court should not, and will not, consider different theories or new questions, if proof might have been offered to refute or overcome them had they been presented at the trial.' [Citation.] In exercising the power care should be taken that the litigants are not deprived of an opportunity to present argument. In the case before us the issue was one of law which involved no problem of

> proof, and the purchasers had an opportunity to file petition for rehearing in the appellate court, but they did not do so." *Hux*, 38 Ill. 2d at 224-25, 230 N.E.2d at 832.

The supreme court has repeatedly relied on the *Hux* analysis. (See *Schutzenhofer v. Granite City Steel Co.* (1982), 93 Ill. 2d 208, 210-11, 443 N.E.2d 563, 564; *People v. Barnard* (1984), 104 Ill. 2d 218, 228-29, 470 N.E.2d 1005, 1008.) In *Barnard*, the court observed that application of Rule 366 is similar to the plain error exception at Rule 615 (107 Ill. 2d R. 615). In *Gatto v. Walgreen Drug Co.* (1975), 61 Ill. 2d 513, 520, 338 N.E.2d 23, 28, the court, citing cases, observed that it had in many instances, pursuant to Rule 366, decided issues that had not been presented to, or decided by, the court which issued the decision that is being reviewed.

This holding has also been applied in numerous appellate court decisions. See, *e.g.*, *Motz v. Central National Bank* (1983), 119 Ill. App. 3d 601, 608-09, 456 N.E.2d 958, 964; *Brown v. Brown* (1978), 62 Ill. App. 3d 328, 332-33, 379 N.E.2d 634, 637; *Siebach v. Pienta* (1978), 60 Ill. App. 3d 645, 647, 377 N.E.2d 393, 395; *City of Wyoming v. Illinois Liquor Control Comm'n* (1977), 48 Ill. App. 3d 404, 407-08, 362 N.E.2d 1080, 1083.

Landers argues *Cockerill v. Wilson* (1972), 51 Ill. 2d 179, 281 N.E.2d 648, distinguishes *Hux*; and that this distinction is equally applicable to *Landers I*. However, in *Cockerill*, the appellate court construed the meaning of a covenant, an issue not argued on appeal; while *Landers I* involved a question of law, whether the facts presented at trial were sufficient to create a contract.

Landers' argument of deprivation of due process by this court in *Landers I* also fails to point out its use of a petition for rehearing. We adopt the reasoning of *Phelps v. O'Malley* (1989), 187 Ill. App. 3d 150, 153-54, 543 N.E.2d 311, 313-14:

> "Defendant fails to recognize that he has not been denied an opportunity to address his contentions to this court. This apportunity is provided to all parties of appeal through a petition for rehearing. Defendant filed a petition for rehearing * * * . * * * It is clear from defendant's petition that he took full advantage of the opportunity to present his contentions to this court. Though defendant did not make the argument made in this appeal that the trial court exceeded its authority, defendant clearly had an opportunity to make this argument and failed to do so. Defendant's arguments in his petition for rehearing were considered and denied. Defendant also took advantage of his right to petition the supreme court, and this was denied. Thus, defendant has had his opportunities."

• 2 In the present case, the alleged oral agreement supposedly arose from the oral communications and the facts surrounding those communications which took place when the Bank changed from a participating lender to the principal lender. This was at a time when all parties were at least partly aware of Landers' financial problems. During the trial of *Landers I*, over the objection of the Bank based on the parol evidence rule, an exhaustive examination of various parties concerning the new financing took place. This testimony provided the evidence upon which the alleged oral agreement was based.

This evidence was considered by our court in determining the decision in *Landers I*. We conclude our decision in *Landers I* was not void and the trial court was correct in denying relief under the section 2-1401 motion.

B

Next, we address whether the trial court erred in granting summary judgment against Charles, Glen, and Maxine. Judgment was entered against Charles' former wife, Lorelyn, but she is not a party to this appeal. After our mandate issued in *Landers I*, the Bank pursued its original actions against Charles, Lorelyn, Glen, and Maxine. The Bank's actions were based on the loan guarantee executed by the four Landerses.

• 3 The answer by Charles was one of general denial, together with two affirmative defenses. The affirmative defenses basically stated that Charles could not be held liable until there was a judicial determination that Landers Seed Company was liable and in default. This was determined in *Landers I*. Charles' answer to the Bank's motion for summary judgment was based on the theory that our decision in *Landers I* was void. No contest existed as to factual issues. The trial court correctly gave validity to our decision, and the summary judgment entered against Charles should be affirmed.

Glen and Maxine filed answers with general denials, together with two affirmative defenses and three counterclaims. The affirmative defenses were similar to those of Charles and, because of our holding in *Landers I*, were without merit. The three counterclaims contained allegations of oral contract. The alleged oral contract was the

subject of our decision in *Landers I*. Glen and Maxine contended they should be allowed to contest the contract issue because they were not parties to the *Landers I* appeal. They contend neither *res judicata* nor collateral estoppel precludes their litigating the contract issue which we decided in *Landers I*.

However, the defendants miss the thrust of the trial court's decision relating to the Bank's motion for summary judgment. Charles, Glen, and Maxine's answers to the motion for summary judgment do not contest the facts, but attack the *Landers I* appellate decision, contending that it is void. The trial court judgment in the present case appears to be based on regular summary judgment analysis.

• 4 It is well established that summary judgment should be granted only when the pleadings, depositions, and admissions, together with any affidavits, show there is no genuine issue as to a material fact and that the movant is entitled to judgment as a matter of law. (*Clifford-Jacobs Forging Co. v. Capital Engineering & Manufacturing Co.* (1982), 107 Ill. App. 3d 29, 33, 437 N.E.2d 22, 25.) It is improper to grant such a judgment where the material evidentiary facts are in dispute or where, when the facts are undisputed, reasonable minds might draw different reasonable inferences from such facts. (*Nationals Bank v. City of Lexington* (1985), 138 Ill. App. 3d 805, 808, 486 N.E.2d 967, 969.) Because it is such a drastic method of disposing of a case, summary judgment should not be employed unless the right of the moving party to such judgment is free from doubt. *Murphy v. Urso* (1981), 88 Ill. 2d 444, 464, 430 N.E.2d 1079, 1088.

The Bank's motion for summary judgment sets forth the debt owing the Bank from Landers Seed Company, the guarantee executed by Charles, Lorelyn, Glen, and Maxine, the defendants' affirmative defenses; Glen and Maxine's three counterclaims; and the opinion in *Landers I*, which establishes that the affirmative defenses no longer had merit. The answers to the motion for summary judgment do not contest the facts directly, attacking the validity of the decision in *Landers I* instead.

• 5 The summary judgment pleadings indicate that there is no issue as to the facts. We have determined, in *Landers I*, that the facts that existed did not, as a matter of law, sustain a finding of an oral agreement. As a result, the trial court had no choice but to grant summary judgment as to Glen and Maxine's counterclaims.

C

Defendants' final argument is that the court erred in denying the request to file a third affirmative defense. This affirmative defense is based on the claim of fraud in the inducement.

The record shows the appellate court mandate was issued on November 30, 1988. On December 15, a status hearing was held. Glen and Maxine's counsel withdrew and counsel for Landers and Charles also entered his appearance for Glen and Maxine. At that time an order was entered setting a cutoff date for all other pleadings. While the order is unclear as to the exact date for cutoff, all parties acknowledge its existence. Defendants filed their request to file the extra defense on February 17, 1989. All parties agree this was done after the cutoff date.

Section2-616(a) of the Code (Ill. Rev. Stat. 1987, ch. 110, par. 2-616(a)) provides:

> "At any time before final judgment amendments may be allowed on just and reasonable terms, * * * changing the cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance * * * which may enable * * * the defendant to make a defense * * * ."

Our courts have continually acknowledged that this section is to be liberally applied so that cases will be resolved on their merits rather than on procedural technicalities. *Bloom v. Landy* (1979), 72 Ill. App. 3d 383, 399, 389 N.E.2d 1286, 1299.

• 6,7 However, a trial court has broad discretion in the allowance of amendments to pleadings. (*Old Salem Chautauqua Association v. Illinois District Council of the Assembly of God* (1958), 13 Ill. 2d 258, 266, 148 N.E.2d 777, 781.) The test in determining whether the discretion was properly exercised is whether it furthers the ends of justice. (*Bowman v. County of Lake* (1963), 29 Ill. 2d 268, 281, 193 N.E.2d 833, 840.) The ultimate efficacy of the claim and previous opportunities to assert a claim may be taken into account. (*City of Des Plaines v. Pollution Control Board* (1978), 60 Ill. App. 3d 995, 1002, 377 N.E.2d 114, 120.) The denial of a motion to amend will not be considered prejudicial error unless there has been a manifest abuse of the court's discretion. *Mundt v. Ragnar Benson, Inc.* (1975), 61 Ill. 2d 151, 161, 335 N.E.2d 10, 16; *Bowman*, 29 Ill. 2d at 281, 193 N.E.2d at 840.

Defendants acknowledge their request to amend their answer occurred after the cutoff date. However,

Glen and Maxine point out they were represented by different counsel until December 14, 1988. When new counsel entered his appearance, he was busy dealing with Landers' writ of *certiorari* to the United States Supreme Court. They maintain counsel did not have an opportunity to review the pleadings until after that time. They also observe that the asserted defense is the same as one of their counterclaims and the Bank would not be surprised. Further, since it introduces a new question, they note this amendment would defeat the Bank's motion for summary judgment.

• 8 The Bank responds by first noting this case commenced in 1984. The defendants filed their answer on October 3, 1984. It observes Glen and Maxine's new counsel was counsel for Charles and Landers throughout the proceeding and was intimately familiar with the case. Therefore, it argues that it would not take new counsel long to familiarize themselves with Glen and Maxine's case. Further, it observes the writ to the Supreme Court was filed on December 31, 1988, which still gave counsel an opportunity to comply with the deadline.

We conclude the trial court was within its discretionary limits, and the judgment of the trial court should be affirmed.

Based on appellant's motion, our court has consolidated the appeal in appellate court case No. 4-90-0023 (an appeal from a turnover order of the Moultrie County court) with this previously filed case in case No. 4-89-0464. The issue on appeal in case No. 4-90-0023 is based on the theory that our decision in *Landers I* was void. That issue having been determined in the negative,

the trial court's order in case No. 4-90-0023 must be affirmed.

No. 4-90-0464, Affirmed.
No. 4-90-0023, Affirmed.
SPITZ and STEIGMANN, JJ., concur.

APPENDIX J

STATE OF ILLINOIS

Appellate Court

FOURTH DISTRICT

SUPREME COURT BUILDING

SPRINGFIELD 62701-1792

CLERK OF THE COURT
(217) 782-2586

RESEARCH DIRECTOR
(217) 782-3528

DATE: 04/05/90

RE: Champaign Natl. Bank v. Landers Seed Co., et al.
General No.: 4-89-0464 & 4-90-0023 Consolidated
Moultrie 84L4

TO COUNSEL:

The court today denied the petition for rehearing filed in the above entitled cause.

The mandate of this court will issue in 7 days to the Clerk of the Circuit Court unless an affidavit of intent to seek review in the Illinois Supreme Court (Rule 368(b)) is filed in this court.

DARRYL PRATSCHER, Clerk
Appellate Court
Fourth District

DP:mcb

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APPENDIX K

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 82706
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October 3, 1990

Mr. John H. Bisbee
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437 N. Lafayette St.
Macomb, IL 61455

No. 70136 – The Champaign National Bank, etc., respondent, v. Landers Seed Co., Inc., et al., petitioners. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for appeal as a matter of right or leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 25, 1990.